FILED
941354 FEB 7 1995
No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

GRAHAM L. COLE,
Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE
AND
AGRICULTURAL STABILIZATION AND
CONSERVATION SERVICE,

On Petition for Writ of Certiorari
To The United States Circuit Court of Appeals
For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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1. Whether the United States Department of Agriculture and its Agricultural Stabilization and Conservation Service have the authority under the Agricultural Adjustment Act of 1938, 7 U.S.C. §1311, et seq., to levy a monetary penalty, authorized by statute to be imposed on the excess marketing of tobacco by tobacco "producers," upon Petitioner Graham Cole for his alleged failure accurately to report all transactions in tobacco carried out by him in his capacity as a "dealer."

2. Whether, when Congress has expressly authorized two unrelated penal sanctions, differing substantially in dollar amount, and where each sanction is, by statute, to apply only to certain unrelated acts, a government agency may apply penal sanction A to act B simply by promulgating a regulatory presumption that act B will be deemed the equivalent of act A.

PARTIES

All parties appear in the caption of the case.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties	ii
Table of Contents	iii
Table of Citations	iv
Reports of Opinions	1
Jurisdictional Grounds	1
Relevant Constitutional Provisions, Statutes and Regulations	1
Statement of Case	6
Argument	10

Appendix

(i) Opinion in Appealed from Judgment A-1
(ii) Opinions and Orders of Other Courts and Administrative Agencies
  a. District Court Memorandum and Order on Motions for Summary Judgment . B-1
  b. District Court Judgment B-4
  c. Determination of ASCS Deputy Administrator State and County Operations B-6
  d. Determinations of Georgia State ASC Committee B-25
(iii) Order on Petition(s) for Rehearing and Suggestion for Rehearing En Banc C-1
(iv) Appealed from Judgment D-1

TABLE OF CITATIONS

Cases: **Page**

Bowles v. Seminole Rock & Sand Co.,
325 U.S. 410 (1945) 18

Chevron U.S.A., Inc. v. Natural Resources Defense
Counsel, Inc., 467 U.S. 837, ... 11,14

Cole v. USDA, 33 F.3d 1263
(11th Cir. 1994) 1,14,15,16,17,18,19

Commissioner v. Acker, 361 U.S. 87 (1959) 11,12

Goldkist, Inc. v. USDA, 741 F.2d 344
(11th Cir. 1984) 15

Jacquet v. Westerfield, 569 F.2d 1339, 1345
(5th Cir. 1978) 15

Keppel v. Tiffin Savings Bank,
197 U.S. 356, 362 (1905) 12

Mulford v. Smith, 307 U.S. 38, 47
(1939) 8

U.S. v. Whittle, 287 F.2d 638
(4th Cir. 1961) 8

West v. Bergland, 611 F.2d 710
(8th Cir. 1979) 15

Constitutional Provisions **Page**

U.S. CONST. amend. V 1

Statutes:

5 U.S.C. §702 9
7 U.S.C. §1311 6
7 U.S.C. §1314(a) 2,8,13
7 U.S.C. §1373(a) 3,8
26 U.S.C. §294(d)(1)(A) (1954 ed.) 12
26 U.S.C. §294(d)(2) (1945 ed.) 12
28 U.S.C. §1254 1
28 U.S.C. §1331 9
28 U.S.C. §1355 9

Regulations:

7 C.F.R. §725.51(g) 7
7 C.F.R. §725.51(rr) 7
7 C.F.R. §725.94(d) 5,11,18
7 C.F.R. §725.94(e) 5,11
7 C.F.R. §726.88(d) 6,11
7 C.F.R. §726.88(e) 6,11

REPORTS OF OPINIONS

Only reported decision is Cole v. USDA, 33 F.3d 1263 (11th Cir. 1994).

All decisions reprinted in Appendix.

JURISDICTIONAL GROUNDS

This Petition ask the Court to review the decision of the United States Court of Appeals for the Eleventh Circuit entered September 13, 1994. Petitioner's Suggestion for Rehearing En Banc and Petition for Rehearing were denied on November 9, 1994. This Court has jurisdiction for this appeal pursuant to United States Code Title 28, Section 1254. 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

U.S. CONST. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in the time of War or public danger; nor shall any person be subject to the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without

due process of law; nor shall private property be taken for public use, without just compensation.

7 U.S.C. § 1314(a):

> **Persons liable.** The marketing of (1) any kind of tobacco in excess of the marketing quota for the farm on which the tobacco is produced, or (2) any kind of tobacco that is not eligible for price support under the Agricultural Act of 1949 because a producer on the farm has not agreed to make contributions or pay assessments to the No Net Cost Tobacco Fund or the No Net Cost Tobacco Account as required by sections 106A(d)(1) [7 USCS §§ 1445-1(d)(1)] and 106(B)(d)(1) of that Act, if marketing quotas for that kind of tobacco are in effect, shall be subject to a penalty of 75 per centum of the average market price (calculated to the nearest whole cent) for such kind of tobacco for the immediately preceding marketing year. Such penalty shall be paid by the person who acquires such tobacco from the producer but an amount equivalent to the penalty may be deducted by the buyer from the price paid to the producer in case such tobacco is marked by sale; or, if the tobacco is marketed by a producer through a warehouseman or other agent, such penalty shall be paid by such warehouseman or agent who may deduct an amount equivalent to the penalty from the price paid to the producer: Provided, That in case any tobacco is marketed directly to any person outside the United States the penalty shall be paid and remitted by the producer. If any producer falsely identifies or fails to account for the disposition of any tobacco, an amount of tobacco equal to the

normal yield of the number of acres harvested in excess of the farm-acreage allotment shall be deemed to have been marketed in excess of the marketing quota for the farm, and the penalty in respect thereof shall be paid and remitted by the producer. Tobacco carried over by the producer thereof from one marketing year to another may be marketed without payment of the penalty imposed by this section if the total amount of tobacco available for marketing from the farm in the marketing year from which the tobacco is carried over did not exceed the farm marketing quota established for the farm for such marketing year (or which would have been established if marketing quotas had been in effect for such marketing year), or if the tobacco so carried over does not exceed the normal production of that number of acres by which the harvested acreage of tobacco in the calendar year in which the marketing year begins is less than the farm-acreage allotment. Tobacco produced in a calendar year in which marketing quotas are in effect for the marketing year beginning therein shall be subject to such quotas even though it is marketed prior to the date on which such marketing year begins.

7 U.S.C. §1373(a) (1988):

> **Persons Reporting**. This subsection shall apply to warehousemen, processors, and common carriers of corn, wheat, cotton, rice, peanuts, or tobacco, and all ginners of cotton, all persons engaged in the business of purchasing corn, wheat, cotton, rice, peanuts, or tobacco from producers, all persons engaged in the business of redrying, prizing, or stemming tobacco for producers, all

agents marketing peanuts for producers, or acquiring peanuts for buyers and dealers, and all peanut growers' cooperative associations, all persons engaged in the business of cleaning, shelling, crushing, and salting of peanuts and the manufacture of peanut products, and all persons owning or operating peanut-picking or peanut-harvesting machines. Any such person shall, from time to time, on request of the Secretary, report to the Secretary such information and keep such records as the Secretary finds to be necessary to enable him to carry out the provisions of this title. Such information shall be reported and such records shall be kept in accordance with forms which the Secretary shall prescribe. For the purpose of ascertaining the correctness of any report made or record kept, or of obtaining information required to be furnished in any report, but not so furnished, the Secretary is hereby authorized to examine such books, papers, records, accounts, correspondence, contracts, documents, and memoranda as he has reason to believe are relevant and are within the control of such person. Any such person failing to make any report or keep any record as required by this subsection or making any false report or record shall be deemed guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than $500; and any tobacco warehouseman or dealer who fails to remedy such violation by making a complete and accurate report or keeping a complete and accurate record as required by this subsection within fifteen days after notice to him of such violation shall be subject to an additional fine of $100 for each ten thousand pounds of tobacco, or fraction thereof, bought or sold by him after the date of such violation: Provided, That

such fine shall not exceed $5,000; and notice of such violation shall be served upon the tobacco warehouseman or dealer by mailing the same to him by registered mail or by certified mail or by posting the same at any established place of business operated by him, or both.

7 C.F.R. 725.94(d) and (e) (1989 ed.):

(d) Dealer's tobacco. The flue-cured tobacco resales by a dealer (as shown or due to be shown on Form MA-79) which are in excess of his total prior flue-cued tobacco purchases (as shown or due to be shown on Form MQ-79) shall be considered to be a marketing of excess tobacco and penalty thereon shall be due at the time the marketing takes place which results in the excess. If the resale which results in penalty being due is made at auction, the warehouse shall deduct the penalty from the proceeds of the sale and shall remit the penalty to the marketing recorder. Penalty due which is not withheld by a warehouseman shall be remitted weekly by the dealer to the State office with his reports on Form MQ-79.

(e) Resales not reported. Any resale of tobacco which is required to be reported by a warehouseman or dealer, but which is not so reported within the time and in the manner required, shall be considered to be a marketing of excess tobacco, unless and until such warehouseman or dealer furnishes a report of such resale which is acceptable to the State executive director. The penalty thereon shall be paid by the warehouseman or dealer who fails to make the report as required.

7 C.F.R. 726.88(d) and (e) (1989 ed.):

> (d) Dealer's tobacco. The burley tobacco resales by a dealer (as shown or due to be shown on form MQ-79) which are in excess of his total prior burley tobacco purchases (as shown or due to be shown on Form MQ-79) shall be considered to be a marketing of excess tobacco and penalty thereon shall be due at the time the marketing takes place which results in the excess. If the resale which results in penalty being due is made at auction, the warehouse shall deduct the penalty from the proceeds of the sale and shall remit the penalty to the marketing recorder. Penalty due which is not withheld by a warehouseman shall be remitted weekly by the dealer to the State office with his reports on Form MQ-79.
>
> (e) Resales not reported. Any resale of tobacco which is required to be reported by a warehouseman or dealer, but which is not so reported within the time and in the manner required, shall be considered to be a marketing of excess tobacco, unless and until such warehouseman or dealer furnishes a report of such resale which is acceptable to the State executive director. The penalty thereon shall be paid by the warehouseman or dealer who fails to make the report as required.

STATEMENT OF THE CASE

A brief explanation of the federal government's regulation of the tobacco industry is necessary to explain the significance of the issues raised in this case. The Agriculture Adjustment Act of 1938 (the "Act"), 7 U.S.C. 1311, et seq., established controls on

the amount of tobacco produced for market in this country. The Act provides for the establishment of a national aggregate production quota to be divided among the states and then subdivided among producers.

Producers are growers who sell their tobacco primarily at auction through "warehousemen" (defined at 7 C.F.R. § 725.51(rr)) and, occasionally, directly to "dealers" (defined at 7 C.F.R. § 725.51(g)). Producers are issued marketing cards which display their marketing quota. Prior to selling, the producer presents his or her card to the warehouseman, or other purchaser, to indicate whether the tobacco sold by the producer is within the producer's farm quota. The acquiring warehouseman or other purchaser also reports the transaction to the United States Department of Agriculture ("USDA") through the USDA's Agricultural Stabilization and Conservation Service ("ASCS"). By regulating the original marketing of tobacco in this manner, Congress effectively constrained total tobacco production without interfering in tobacco's secondary markets.

Penalties On The Producer's Marketing Of Over-Quota Tobacco

The Act also provides for the imposition and collection of certain penalties for the marketing of tobacco by producers in excess of the quota for the farm on which it is grown ("Over-quota Tobacco"):

> **§1314. Penalties**
>
> **(a) Persons liable.** The marketing of (1) any kind of tobacco in excess of the marketing quota for the farm on which the tobacco is produced, . . . shall be subject to a penalty of 75 per centum of the average market price . . . for such kind of tobacco for the immediately preceding marketing year. Such penalties shall be paid by the person who acquires such tobacco from the producer but an amount equivalent to the penalty may be

> deducted by the buyer from the price paid to the producer in case such tobacco is marketed by sale; or, if the tobacco is marketed by the producer through a warehouseman or other agent, such penalty shall be paid by such warehouseman or agent who may deduct an amount equivalent to the penalty from the price paid to the producer: . . ..

7 U.S.C. § 1314(a).

The Act provides that the penalty for a producer's marketing Over-quota Tobacco shall be collected from the person acquiring the tobacco from the producer (with the acquiring purchaser then having a statutory right to reduce the purchase price by such amount or to otherwise collect the amount of the penalty from the producer). However, "it is clear that the imposition of the penalty is on the offending producer." U.S. v. Whittle, 287 F.2d 638, 640 (4th Cir. 1961) (emphasis added). The Act "purports to be solely a regulation of interstate commerce, which it reaches and affects at the throat where tobacco enters the stream of commerce - the marketing warehouse" Mulford v. Smith, 307 U.S. 38, 47 (1939).

Legislation Affecting Tobacco Dealers

While producers actually grow tobacco, dealers simply buy tobacco at what they hope is a low price either on the auction market, from a warehouseman, from another dealer or occasionally from a producer, and subsequently resell that tobacco hopefully at a higher price. Recognizing that, through device or simply poor record keeping, some dealers, who operate in the unregulated secondary market, might effectively allow a producer to sell Over-quota Tobacco outside the regulatory process, Congress included in the Act certain penal sanctions which are to be imposed on dealers in their capacity as dealers. Section 1373(a) of Article 7 requires all dealers to report all purchases and sales to the USDA and imposes criminal penalties for failure to file such reports or failure to file them accurately. These reports are ultimately

forwarded to the ASCS office in Kansas City, Missouri, where a USDA computer monitors the "balance" of dealer purchases and sales.

If a dealer sells more tobacco than he has purchased, the ASCS sends out a statement advising the dealer that, according to the dealer's reports, he or she has sold more tobacco than was purchased and, in a practice challenged in this action, ignores the section 1373(a) penalty for inaccurate reporting and, instead, assesses that dealer with the statutory penalty for a producer's marketing of Over-quota Tobacco.

During the tobacco selling years of 1985-1986, 1986-1987, and 1987-1988, Cole, through his tradename Peachtree Tobacco Company, operated as a "dealer" of tobacco. During each of these years, through a series of events which are, to some extent disputed, but which are not relevant for purposes of this appeal, Cole reported sales in excess of purchases.[1] Notwithstanding the Government's knowledge of these alleged oversales by the end of February of each crop year, in several letters dated March 6, 1990, the ASCS notified Cole that he was being assessed with Over-quota Tobacco penalties totalling $398,756.59.

At no time during the administrative or litigation process did the USDA or the ASCS identify any producer who the USDA contended had sold Over-quota Tobacco to Cole. Rather, the Agency has consistently stated that the penalties have been assessed against Cole in his capacity as a "dealer" and not against any producer of tobacco they contend was Over-quota Tobacco.

Cole filed suit in District Court challenging an adverse administrative determination of his liability for certain penalties under Section 1314(a). Jurisdiction of the District Court was based on Section 702 of Title 5 and Sections 1331 and 1355 of

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[1] Cole was involved in both the burley and flue-cured tobacco markets (located primarily in Kentucky and Georgia respectively). The reporting problems arose from the use of his card by a third-party. This fact, coupled with the Government's five year delay in identifying the reporting discrepancies, make it extremely difficult for him now to prove that no Over-quota Tobacco was purchased.

Title 28 of the United States Code. Cole moved for summary judgment claiming certain regulations relied on by the USDA in accessing the penalties violated his rights to Due Process and exceeded the Agency's statutory authority. The District Court granted Cole's motion and entered judgment in his favor. The USDA appealed to the Eleventh Circuit Court of Appeals, which reversed the District Court in a 2-1 decision.

ARGUMENT

In this case, the USDA is attempting to unilaterally extend its authority to impose penal sanctions in contravention of the consistent pronouncements of this Court as to the extent of an agency's authority to impose such sanctions and in a manner contrary to the express provisions of federal statutes. If left to stand, the decision of the Eleventh Circuit Court of Appeals could be used by the USDA and other federal agencies to expand there own authority without any corresponding grant from Congress.

The mechanisms of the agency's extension of its authority are certain regulatory presumptions which deem conduct which may be penalized under section 1373(a), i.e. a dealer's failure properly to report all purchases and sales, to be conduct which may be penalized under section 1314(a), the marketing of Over-quota Tobacco:

> (d) Dealer's tobacco. The . . . tobacco resales by a dealer (as shown or due to be shown on form MQ-79) which are in excess of his total prior . . . tobacco purchases (as shown or due to be shown on Form MQ-79) shall be considered to be a marketing of excess tobacco and penalty thereon shall be due at the time the marketing takes place which results in the excess.

> (e) Resales not reported. Any resale of tobacco which is required to be reported by a warehouseman or dealer, but which is not so reported within the time and in the manner required, shall be considered to be a marketing of excess tobacco, unless and until such warehouseman or dealer furnishes a report of such resale which is acceptable to the State executive director. The penalty thereon shall be paid by the warehouseman or dealer who fails to make the report as required.

7 C.F.R. 725.94(d) & (e) and 726.88(d) & (e) (dealing with flue-cured and burley tobacco respectively). These regulatory presumptions have the effect of extending the USDA's authority to impose a particular penal sanction to imposition of that sanction on conduct not made the subject of such sanction by the authorizing statute.

I. The Court Of Appeals Holding Is Contrary To Each Of Two Separate Lines of Decisions By This Court.

The USDA's actions in this situation clearly run afoul of this Court's decisions in Commissioner v. Acker, 361 U.S. 87 (1959) and Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., et al., 467 U.S. 837 (1984). As set forth below, Acker limits the application of penal statutes to their express terms, while Chevron prohibits an agency from promulgating regulations that are inconsistent with express, unambiguous statutory terms. Here, the USDA has, on its own authority, enlarged the scope of a statutory penalty in a manner inconsistent with the clear dictates of Congress.

The District Court concluded that the USDA's regulations exceeded the agency's authority under the Act:

> In this case, contrary to the statutory scheme, instead of levying a fine against a producer who

> may have harvested more than his quota of tobacco for any of the years in question, Defendants have levied a fine against a dealer based solely upon the fact that the dealer sold more tobacco than he purchased. The point being that the statute makes no provision for the levying of a penalty upon a dealer for the sale of more tobacco than he has purchased.

Memorandum Opinion at 3 (See Appendix B-2, B-3). Unfortunately, the simplicity and clarity of the District Court's analysis and ruling were lost in the Court of Appeals.

A. The Court Of Appeals Ignored The Striking Similarity Of The USDA's Actions In This Case With The Agency Action Rejected By The Court In Acker.

This Court has long and consistently held that "penal statutes are to be strictly construed" and that "one 'is not to be subjected to a penalty unless the words of a statute plainly impose it'." Acker, 361 U.S. at 91, citing Keppel v. Tiffin Savings Bank, 197 U.S. 356, 362 (1905). In Acker, the Internal Revenue Service sought to collect one penalty prescribed by statute to apply to a person's underestimate of income taxes (26 U.S.C. (1954 ed.) § 294(d)(2)) on a taxpayer's failure to file any estimate of tax, the latter being covered by a separate (and, by dollar amount, lesser) statutory penalty (26 U.S.C. (1954 ed.) § 294(d)(1)(A)). This Court rejected the government's position finding no "expressed or necessarily implied provision or language" of section 294(d)(2) "that purports to authorize the treatment of a taxpayer's failure to file a declaration of estimated tax as, or the equivalent of, a declaration estimating his tax to be zero." Acker, 361 U.S. at 91.

Notwithstanding its oft-quoted language, the Acker holding actually creates a subsidiary or refinement of the "plainly imposed" principle - i.e., that "one is not subject to a penalty unless the words of a statute plainly impose it" and *the person has committed*

the particular act on which the statute plainly imposes that penalty. This corollary is directly applicable in this case and demands a result contrary to the Court of Appeals' decision.

Here, Congress has plainly imposed one penalty on the marketing of Over-quota Tobacco by a producer (section 1314(a)) and a separate penalty on a dealer's failure accurately to report his activities (section 1373(a)). As in Acker, the agency has here promulgated a regulation which deems an action, which should be subject to the lesser section 1373(a) penalty, to be "the equivalent of" an action subject to the higher section 1314(a) penalty.

Nothing in the language of section 1314(a) implies Congress intended application of that penalty to be available as an addition to, or in lieu of, the section 1373(a) penalty applicable to a dealer's faulty recordkeeping. Indeed, section 1314(a), by its own terms, creates a presumption of marketing, but limits its application to a producer's failure to keep records:

> If any producer falsely identifies or fails to account for the disposition of any tobacco, an amount of tobacco equal to the normal yield of the number of acres harvested in excess of the farm acreage allotment shall be deemed to have been marketed in excess of the marketing quota for the farm, and the penalty in respect thereof shall be paid by the producer . . ..

7 U.S.C. § 1314(a) (emphasis added).

Clearly, the USDA's promulgation of the regulations here at issue derives from the agency's opinion that Congress did not sufficiently punish dealers under section 1373(a), and so the agency has undertaken to rewrite and expand that sanction.

B. The Court Of Appeals Failed Properly To Apply The Chevron Test To The USDA's Regulations.

In Acker, as here, the action sought to be penalized by the government was properly the subject of separate, less onerous statutory penalties, which the government chose to ignore. This point was picked up by Judge Godbold in his dissent from the Court of Appeals' majority opinion. Citing Chevron, supra, Judge Godbold pointed out that, in reviewing agency action, a court should properly apply a two-step analysis, the first issue being "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Cole v. USDA, 33 F.3d 1263, 1272-73 (11th Cir. 1994), citing Chevron, 467 U.S. at 842-3.

Here, the "question" is what penalty is plainly imposed on a tobacco dealer's failure to keep records. In section 1373(a), Congress clearly spoke to this question and unambiguously imposed the section 1373(a) penalty. For its own reasons, the USDA ignored that clear direction and, instead, sought to impose the section 1314(a) penalty in a situation to which it did not, by its terms, apply. As Judge Godbold maintained in dissent:

> [T]he Act does not plainly impose the [excess marketing] penalty on a dealer except to the extent he has acquired from a producer, nor plainly impose it on his function as seller, nor upon a resale transaction. It does not plainly impose that penalty on transactions the subject matter of which is not shown to be over-quota tobacco and the source of which is not shown to be a producer, nor upon a transaction involving tobacco with respect to which it is not known whether a

producer-to-acquirer penalty has already been paid.

Cole, 33 F.3d at 1275.

II. In Addition To Ignoring Acker And The First Step Of The Chevron Analysis, The Court Of Appeals Also Improperly Applied The Second Step Of The Chevron Analysis.

The interplay between Acker and Chevron only surfaces where a court considers the legitimacy of agency regulations imposing penal sanctions. While Judge Godbold was correct in noting the Court of Appeal's majority mistakenly ignored Chevron's first tier inquiry, in fact, he failed to recognize that under Acker and its progeny, when considering the validity of a regulation imposing penal sanctions, only Chevron's first tier inquiry is relevant. In other words, under Chevron, where a statute is clear and unambiguous, its intent must be followed, and it is only if ambiguity exists that the agency is allowed the interpretive flexibility to promulgate regulations "rationally related" to the statute. However, since, under Acker, penal statutes must "plainly" impose the sanction, no ambiguous statute could serve as the basis for such a penalty, and no regulatory interpretation by the agency could cure the statute's defects.

This is not to say that an agency may not impose any sanctions under regulations promulgated as an interpretation of an ambiguous statute. Clearly, it may impose administrative sanctions. See Gold Kist, Inc. v. USDA, 741 F.2d 344, 348 (11th Cir. 1984); West v. Bergland, 611 F.2d 710 (8th Cir. 1979), cert. denied, 449 U.S. 821 (1980); Jacquet v. Westerfield, 569 F.2d 1339, 1345 (5th Cir. 1978). However, under Acker, no penal sanctions, such as imposed in this case, would be legitimate.

The majority decision very obviously did not draw any distinction between regulations involving penal sanctions versus administrative sanctions. Perhaps the reason for this misunderstanding is the majority's mistaken reliance on prior cases dealing with statutorily created presumptions in determining the

proper standard to be applied in considering the validity of the USDA's regulatory presumption.

III. Even If It Had Been Appropriate For The Court Of Appeals To Apply The Second Step Of The Chevron Analysis, The Court Nonetheless Erred In Determining The USDA's Regulations Were Rational.

The Court of Appeal's spent a great deal of time defending the rationality of the USDA's presumptions. As discussed above, "rationality" was not the proper test to be applied to the agency's regulatory basis for imposing penal sanctions. Nonetheless, even if it had been the correct standard, as Judge Godbold pointed out, the majority's determination that the presumed fact (i.e. that Over-quota Tobacco had been sold) was rationally related to and flowed naturally from the predicate fact (that a dealer's sales exceeded his purchases) ignored numerous factors which must be considered in order to determine if a rational relationship between the two facts exists. 33 F.3d at 1274.

In order to make the leap from (to use the Court of Appeals' terms) the predicate fact, i.e. that a dealer reports more sales than purchases, to the presumed fact, that Over-quota Tobacco has been acquired by the dealer, the regulatory presumption assumes several facts:

> 1. "That one or more unidentified producers have sold to some one or more unidentified purchasers over-quota tobacco."
>
> 2. "That the penalties that should have been paid on one or more of those producer-to-acquirer transactions were not paid by the purchaser(s)."
>
> 3. That the penalties that should have been paid on one or more of those producer-to-acquirer transactions were not paid by the producer

pursuant to the statutory presumption of marketing contained in section 1314(a).

4. "That the penalties due for any of the [presumably] over-quota tobacco have not been paid by any downstream owner of any of the tobacco."

5. "That some or all of the [presumably] over-quota tobacco that was the subject matter of one or more producer-to-acquirer transactions has come into the hands of the dealer and has been resold by him."

6. "That all tobacco resales, the dealer's records of which do not comply with [the agency's regulations], are resales of over-quota tobacco which meet the foregoing conditions."

7. "That a recorded paper trail exists in the tobacco industry that in fact would reveal to a dealer who purchases tobacco but is not the purchaser in the underlying § 1314(a) transactions that tobacco he is acquiring is over-quota tobacco on which no penalty has been paid."

(portions of the above text appearing within quotation marks were taken from Judge Godbold's dissent, 33 F.3d at 1274). By basing its regulations on this complex set of assumptions, the USDA has clearly extended application of a penal sanction to situations which cannot be deemed naturally to flow from or rationally related to situations legitimately covered by the penalty.

The majority was not concerned with this "tangled web," apparently satisfied with its erroneous conclusion that the

presumptions were rebuttable.[2] Id. at 1266 n.4. Moreover, by the government's waiting five years to notify Cole of his reporting errors, any evidence which he might have used to rebut the presumption would have been difficult to muster.

In conclusion, the language of Judge Godbold in his dissent sums up the magnitude and significance of the Court of Appeals' departure from the rulings of this Court:

> This court holds that Gold Kist [decided under Acker] is inapplicable because a presumption is involved. The presumption is created by regulation, not by the statute. If that interpretation is accepted an agency can expand its power over areas in can regulate simply by presuming that things or events it *wants to have power* to regulate constitute something the agency *does have power* to regulate. An agency may not give itself "clear congressional authorization" to act in or regulate

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[2] By far, the majority of Cole's penalties were assessed under 7 C.F.R. § 725.94(d) for reporting more sales than purchases. There is no right to rebut the presumption of that regulation ("penalty thereon shall be due"). The majority dismisses this "irrebuttability" based on the USDA's indication that they would, in fact, consider evidence from Cole that would tend to rebut the presumption. However, as pointed out by Judge Godbold, the regulation unambiguously fails to provide for rebuttal and, thus, is not subject to "interpretation" even by the agency. See Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).

> an area simply by presuming that things outside its authority constitute things within its authority.

Id. at 1276 (emphasis original). Based on the above, Petitioner respectfully requests the Court grant this Petition and review the decision of the Court of Appeals.

Respectfully Submitted,

MOORE, TYNDALL & CASTELLOW

By: _____
David R. Tyndall
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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-8230

D. C. Docket No. CV-91-4-THOM-JRE

GRAHAM L. COLE

Plaintiff-Counter-
Defendant-Appellee,

versus

UNITED STATES DEPARTMENT OF AGRICULTURE, AGRICULTURAL STABILIZATION AND CONSERVATION SERVICE,

Defendants-Counter-
Claimants-Appellants

Appeal from the United States District Court
for the Middle District of Georgia

(September 13, 1994)

Before ANDERSON AND DUBINA, Circuit Judges, and GODBOLD, Senior Circuit Judge.

ANDERSON, Circuit Judge:

The United States Department of Agriculture imposed

monetary penalties on plaintiff-appellee Graham L. Cole, a tobacco dealer, under statutes and regulations governing the marketing of tobacco. After unsuccessfully challenging the penalties at the administrative level, Cole brought the present action in district court, eventually moving for summary judgment on the ground that the Secretary of Agriculture laced specific statutory authority to impose a penalty for Cole's conduct. The district court agreed and granted Cole's motion. We are presented with an appeal from a grant of summary judgment involving issues of law; therefore we review the district court's ruling de novo. Akins v. Snow, 922 F.2d 1558, 1560 (11th Cir.1991); Frio Ice, S. A. V. Sunfruit, Inc., 918 F.2d 154, 157 (11th Cir.1990).

Although in the district court Cole asserted several factual defenses to the imposition of the penalty in this case, Cole's motion for summary judgment, and the district court's grant thereof, were based solely upon Cole's argument that there was no statutory authority for the imposition of this particular penalty. Cole concedes that the penalty assessed against him was imposed pursuant to a correct application of the regulations at issue; accordingly, Cole's argument is that there is no statutory authority for the regulations. The gist of Cole's argument is that the statute authorizes the imposition of a penalty when a producer sells over-quota tobacco to a dealer, but does not authorize the imposition of a penalty upon the next stage in the marketing process, i.e., upon the dealer's resale. Because the regulations focus on the second event (the dealer's resale), and because the penalty in the instant case was imposed upon dealer Cole on account of his resale, Cole argues that the regulation and the penalty imposed in this case are beyond statutory authority. In other words, Cole argues that the regulation imposes the penalty on the wrong event. In response, the government argues that proof of the second event triggers a presumption by virtue of which the first event is inferred; that is, that a regulatory presumption operates to sap Cole's argument of all of its force. A brief review of the statutory and regulatory framework is required for an understanding of this case.

STATUTORY AND REGULATORY FRAMEWORK

The marketing of tobacco is subject to government regulation pursuant to the Agricultural Adjustment Act of 1938 (codified as amended at 7 U.S.C.A. § 1311 et seq.) In addition to statutory guidelines, the Act authorizes the Secretary of Agriculture to issue regulations for the enforcement of the marketing scheme.[1] 7 U.S.C. § 1375. The amount of tobacco marketed is controlled by a quota system that establishes an allotment to each tobacco-producing farm. The marketing of tobacco in excess of a producer's allotment is subject to a penalty, as specified in 7 U.S.C. § 1314(a):

> The marketing of...any kind of tobacco in excess of the marketing quota for the farm on which the tobacco is produced...shall be subject to a penalty of 75 per centum of the average market price...for such kind of tobacco for the immediately preceding market year. Such penalty shall be paid by the person who acquired such tobacco from the producer but an amount equivalent to the penalty may be deducted by the buyer from the price paid to the producer....

Thus, the statute provides that when a dealer or other purchaser buys tobacco from a producer in excess of the producer's allotment (over-quota tobacco), the purchaser must remit the penalty to the government; the purchaser may then recover the penalty from the producer. Cole acknowledges that he is a dealer who purchases tobacco from producers, among other sources. Any person who acquires over-quota tobacco--a broad class that includes dealers

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[1]The parties agree that the regulations found in the 1989 edition of the Code of Federal Regulations were applicable at all times relevant to this case. The regulatory scheme has subsequently been changed, although the presumptions at issue in this case are still contained in the regulations. *See* 7 C.F.R. § 723.410 (1993 ed.).

such as Cole--is subject to collection of a penalty under Section 1314(a).

The marketing scheme involves a regulatory record-keeping mechanism that accounts for all tobacco sales and purchases. The Department of Agriculture ("USDA") issues a marketing card to each producer. A marketing card shows the producer's total allotment or quota; every time the producer sells tobacco, the quantity of the sale is noted on the card. Purchasers from a producer should, and as a practical matter do, look at the producer's card at the time of each purchase; and thus, it is readily apparent to any purchaser when the producer has sold his quota of tobacco. In addition, parties who purchase tobacco (including dealers) are required to report the amount of each purchase to the USDA. Similarly, each purchaser is required to report each resale. Thus there is a reported accounting each time the ownership of a pound of tobacco changes.[2]

The USDA's regulations also provide for penalties when dealers sell more tobacco than they have reported purchasing or fail to report the resale of tobacco. These regulations--the subject of this action--provide as follows:[3]

> (d) Dealer's tobacco. The flue-cured tobacco resales by a dealer which are in excess of his total prior flue-cured tobacco purchases shall be considered to be a marketing of excess tobacco and penalty thereon shall be due at the time the

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[2]*See generally* 7 C.F.R. §§ 725.87, 725.98-.100 (1989 ed.).

[3]The quoted regulations apply to flue-cured tobacco, one of the two types of tobacco at issue in this case. Substantively identical regulations apply to burley tobacco, the second type of tobacco involved. 7 C.F.R. § 726.88 (1989 ed.).

> marketing takes place which results in the excess...

7 C.F.R. § 725.94(d) (1989) ed.) (parenthetical material omitted).

> (e) Resales not reported. Any resale of tobacco which is required to be reported by a warehouseman or dealer, but which is not so reported within the time and in the manner required, shall be considered to be a marketing of excess tobacco, unless and until such warehouseman or dealer furnishes a report of such resale which is acceptable to the State executive director. The penalty thereon shall be paid by the warehouseman or dealer who fails to make the report as required.

7 C.F.R. § 725.94(e) (1989 ed.).

DISCUSSION

Accepting Cole's argument that the regulations impose the penalty on the wrong event, the district court concluded that the regulation went beyond the statutory authority. The flaw in the district court's analysis of this case was its failure to recognize that the relevant regulations create a rebuttable presumption that dealer Cole purchased over-quota tobacco from a producer. The district court never addressed the government's indication that the regulations impose a presumption. Nor did Cole address the presumption issue in the district court. On appeal, Cole acknowledges that the regulations create a presumption. Appellee's Br. at 13 n. 6, 19.[4] However, apparently failing to

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[4]We note that the language of 7 C.F.R. § 729.-94(e) is couched in terms of a rebuttable presumption. On the other hand, we note that 7 C.F.R. § 725.94(d) is not; its language does not expressly provide for an opportunity to rebut. However, as noted in text, Cole acknowledges that a presumption is created.

recognize the significance of that fact, Cole does not address the legal significance of the presumption or the legal principles governing regulatory presumptions.

The government contends that 7 C.F.R. § 725.94(d) and (e) create a presumption: when a tobacco dealer sells more tobacco than he has reported buying, or when a dealer fails to report a resale of tobacco, it is presumed that the tobacco sold was over-quota tobacco, i.e., tobacco purchased from a producer in excess of that producer's quota. The relevance of this presumption is obvious. The presumed fact--purchase of over-quota tobacco from a producer--is the fact, Cole acknowledges, that triggers the statutory penalty.[5] Thus, if the presumed fact properly flows from the predicate fact--a dealer's resale of more tobacco than he

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Moreover, it is clear from the administrative proceedings in this case that the government has consistently treated the presumption as rebuttable. *See, e.g.*, Transcript of Proceedings, in the Matter of Civil Penalties Assessed Against Peachtree Tobacco Co. for Excess Marketing (June 20, 1990), at 4 (Admin.R. 60) (stating that penalties would be assessed against Cole "unless he furnishes satisfactory proof that these were not excess resales"); *see also* Letter from Samuel F. Brewer to Graham L. Cole, June 1, 1989 (Admin.R. 246); Letter from Ralph T. Hudgens to Graham L. Cole (undated) (Admin.R. 193); Letter from Ralph T. Hudgens to Graham L. Cole, March 6, 1990 (Admin.R. 157) (all stating that Cole may contest the penalty by furnishing proof that the excess poundage was not over-quota tobacco). An agency's interpretation of its own regulations is controlling unless it is plainly erroneous or inconsistent with the regulation. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945); *see also Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 156, 111 S.Ct. 1171, 113 L.Ed.2d. 117 (1991) (indicating that an agency's interpretation of regulations taken during an administrative proceeding is not a "*post hoc* rationalization" and is entitled to deference).

[5]Cole makes no argument that there is a lack of statutory authority for a penalty to be collected from him upon proof that he purchased over-quota tobacco from a producer. Indeed, Cole could hardly make such an argument in the fact of the plain language of the statute, which provides that any person (clearly including a dealer like Cole) who purchases such over-quota tobacco shall pay the penalty.

reported buying or a dealer's failure to report a resale--then Cole's argument must fail.

As mentioned, Cole acknowledges for purposes of summary judgment that the fact to be presumed would authorize the penalty. Nor does Cole in this summary judgment posture contest the predicate fact, i.e. that in fact he did resell more tobacco than he reported purchasing or that he did fail to report resales. Thus, if the presumed fact properly flows from the predicate fact, it is clear that the penalty at issue was appropriately imposed.

Viewed in proper perspective, the true issue in this appeal is the validity of the regulatory presumption. The law is well established that presumptions may be established by administrative agencies, as long as there is a rational nexus between the proven facts and the presumed facts. Alabama By-Products Corp. v. Killingsworth, 733 F.2d 1511 (11th Cir.1984); Atchison, T. & S.F. Ry. v. ICC, 580 F.2d 623, 629 (D.C.Cir.1978). In Killingsworth, this court was confronted with a challenge to a regulatory presumption adopted under the Federal Coal Mine Health and Safety Act of 1969. Although that case, unlike the present one, involved a direct challenge to the constitutionality of the presumption under the Due Process Clause, the standard employed in Killingsworth is generally applicable: a presumption is valid "if there is some rational connection between the fact proved and the ultimate fact presumed, and inference of one fact from proof of another is not so unreasonable as to be a purely arbitrary mandate." Alabama By-Products Corp. V. Killingsworth, 733 F.2d at 1517 (citing Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 28, 96 S.Ct. 2882, 2898, 40 L.Ed.2d 752 (1976). See also Atchison, T. & S.F. Ry. v. ICC, 580 F.2d 623, 629 (D.C.Cir. 1978) (adopting the rational connection test when determining whether "presumptions embodied in the challenged regulations represent a legitimate exercise of the [agency's] authority" under the applicable statute).

Thus, in challenging the validity of the regulatory presumption in this case, Cole bears the heavy burden of demonstrating that there is no rational connection between the fact proved and the ultimate fact to be presumed. As mentioned above, however, Cole does not address the issue of the validity or rationality of the presumption. Therefore, we must take the arguments he does make and assess their relevance and significance when cast in the proper context: as challenges to the validity of the regulatory presumption. We discuss in turn the several arguments asserted by Cole.

First, Cole argues that the penalty is not imposed on dealers like himself, but rather is imposed only upon producers, i.e., farmers. This argument is without merit, because the express language of the statute itself provides for collection of the penalty from the broad class of persons who buy tobacco from producers, which of course includes dealers. Indeed, Cole never argues that the penalty against him would have been improper had the government based it upon his purchase of over-quota tobacco from a producer. Rather, Cole merely uses this first argument to enhance the appeal of his major argument discussed immediately below, namely, that the regulations impose the penalty on the wrong event.[6]

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[6]Cole points to *United States v. Whittle*, 287 f.2d 638 (4th Cir.1961), to support his argument that the Section 1314(a) penalty is levied against the producer. The *Whittle* court held that ultimate liability for the penalty did fall on the producer. Apparently rejecting an argument that the government could proceed *only* against the dealer, the court held that the government could collect the penalty directly from the producer in order to avoid "an unnecessary circuity in the collection of the penalty." *Id.* at 640. Nothing in *Whittle* suggest that the government could not also have exercised its option to collect the penalty from the dealer; indeed, any such holding would have contradicted the plain language of the statute. As noted above, the statute expressly provides for collection of the penalty from the dealer-purchaser, leaving the dealer free to recover the amount of the penalty from the producer if he so chooses. If Cole is unable to rebut the presumption that he entered into the purchase of excess tobacco from a producer, he must pay the Section 1314(a) penalty, but then may recover that amount from the producer with whom he entered the unauthorized transaction. This is exactly

Second, the major thrust of Cole's argument is that the statute authorizes a penalty upon event A--i.e., the sale of over-quota tobacco by a producer to a dealer--whereas the regulation imposes a penalty upon event B--i.e., the resale by a dealer. Thus, Cole argues, the regulation has penalized the wrong event and is beyond the statutory authority. It is immediately apparent that Cole's argument fails to recognize the significance of the regulatory presumption. To the extent that the fact to be presumed (event A) is properly inferred from proof of the predicate fact (event B), Cole's argument evaporates. The USDA is not, in fact, imposing a penalty on event B. Rather, event B is merely evidence of event A, and it is uncontested that a penalty may be imposed upon event A.[7]

Thus, we are taken back again to the true issue in this appeal: the validity and rationality of the regulatory presumption.

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the process that the statute anticipates.

[7]Cole relies on *Gold Kist, Inc. v. USDA*, 741 F.2d 344 (11th Circ.1984), to support his contention that the penalties imposed by administrative agency regulations must be expressly authorized by statute. However, this case is unlike *Gold Kist*. In that case, the position of the USDA was that it had "inherent authority to impose money penalties" without the necessity of express statutory authority. *Id*. at 345. The USDA argued that the mere existence of a regulatory scheme regarding peanuts was sufficient to authorize penalties which were not specifically provided for by statute. Rejecting the USDA position, this court held that a "statute must plainly establish a penal sanction in order for the agency to have authority to impose a penalty." *Id*. at 348. *Gold Kist* did not involve regulatory presumptions. By contract, in this case, the USDA does not attempt to justify the penalties assessed against Cole by mere reference to the regulatory scheme regarding tobacco, or by invoking its inherent authority. Rather, the government points out that the penalties are precisely those authorized by Section 1314(A), and that it has established the precise event upon which the statute imposes a penalty by inferring same from proof of the predicate fact. In other words, this case is different from *Gold Kist* because in this case, through operation of the presumption, the precise fact upon which the statute imposes a penalty is presumed from demonstration of predicate facts. Thus, as discussed in text, the issue in this case is the validity and rationality of the regulatory presumption.

We continue our consideration of the only arguments asserted by Cole that are relevant to this issue.

Cole faults the government for failing to affirmatively identify over-quota tobacco that has been purchased by Cole from a producer. The obvious flaw in this argument is that this is precisely the fact to be presumed, thus implicating again the necessity for Cole to demonstrate that the presumption is irrational. Cole's argument also misplaces the burden. It is the party challenging the validity of the presumption who must demonstrate that it is irrational. Alabama By-Products Corp. v. Killingsworth, 733 F.2d 1511, 1517 (11th Cir.1984) (noting that the burden of proving arbitrariness is on a party challenging a statutory presumption on due process grounds); Atchison, T. & S.F. Ry. v. ICC, 580 F.2d 623, 629 (D.C.Cir.1978) (regulatory presumptions are entitled to deference); United States v. Parish of St. Bernard 756 F.2d 116, 1124 (5th Cir.1985) (a regulation is presumptively valid, and one who attacks it has the burden of showing invalidity), cert. denied, 474 U.S. 1070, 106 S.Ct. 830, 88 L.ed.2d 801 (1986). Thus, the burden is on Cole to demonstrate that the regulatory presumption at issue is invalid because the presumed fact has no rational connection with the predicate fact.

Cole has adduced no evidence, nor proffered any reasons which pass scrutiny, indicating that there is no rational connection between the presumed fact and the predicate fact. Moreover, there is nothing intuitively irrational about the instant presumption. To the contrary, the fact that the predicate fact involves the immediately succeeding state in the marketing process suggests potential rationality.[8] For example, consider the following

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[8]Cole implicitly argues that the fact that event A (the sale by producer to dealer) and event B (the resale by dealer) occur at different stages somehow indicates that the two events are totally unrelated. However, the fact that the two events involve different stages of the marketing process says little or nothing with respect to whether or not there is a rational nexus between the two events, and it certainly does not demonstrate or carry Cole's burden of demonstrating that

hypothetical case. A producer with a quota of 10,000 pounds of tobacco instead grows 12,000. The producer then sells his entire production to a single dealer. The producer and the dealer agree that both parties will report the marketing of only 10,000 pounds, thus hiding the excess.[9] The dealer later resells and properly reports 10,000 pounds of tobacco, but resells without reporting the additional 2,000 pounds. The innocent purchaser of these 2,000 pounds, however, should report the sale. At the end of the marketing year, the USDA discovers that the dealer has sold 2,000 more pounds of tobacco than he reported. Under the regulation, the predicate fact (i.e., that the dealer sold 2,000 more pounds than he reported) provides the basis for inferring the fact to be presumed (i.e., that the dealer purchased the 2,000 pounds as over-quota tobacco from a producer). It seems apparent in this hypothetical case that the predicate fact does provide some relevant evidence of the fact to be presumed.[10]

The connection between the predicate fact and the fact to be presumed must also be placed in proper context-- that is, a context in which every purchase and every sale of tobacco is required by regulation to be recorded and reported. Thus, the required records account for every purchase by every dealer, and also every resale. A dealer's resales should precisely balance that dealer's purchases. In addition, the record of each purchase

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there is no rational connection at all. Moreover, as noted in the text, the two events do occur in immediately succeeding stages of the same marketing process. Also, the two events are tied together as indicated below by the record and reporting requirements of the regulatory framework.

[9]Under the regulatory framework, an innocent dealer would examine the producer's marketing card and it would be immediately apparent that 2,000 pounds were over-quota.

[10]The reason for the presumption is also apparent. Because of the collusion between the producer and dealer in the hypothetical, it would be difficult for the government to trace and identify the producer who initially sold the over-quota tobacco.

should indicate whether it included over-quota tobacco subject to the penalty. Finally, and significantly, the equity of the obligation placed upon dealers like Cole is ensured by the fact that a dealer should always know when he is purchasing over-quota tobacco; the producer's card will readily reveal this fact. Through this regulatory scheme, a dealer's resales (the predicate event) are linked by the regulatory framework to that dealer's purchases (which necessarily include any over-quota purchases from a producer, the event to be presumed). Thus, when the predicate fact in this case and the presumed fact are viewed in their context of this regulatory scheme, the relationship is obviously close.

> The Secretary shall provide by regulations for the identification, wherever necessary, of corn, wheat, cotton, rice, peanuts, or tobacco so as to afford aid in discovering and identifying such amounts of the commodities as are subject to and such amounts thereof as are not subject to the marketing restrictions in effect under this subchapter.

Thus, the statute specifically authorizes regulations that will identify the commodity at the various stags for the express purpose of aiding "in discovering and identifying such amounts of the commodities as are subject to" the various penalties and other restrictions. This seems to contemplate identifying and proving over-quota tobacco by means of evidence reflecting the identity of the commodity at the various stages in the marketing process.

Finally, Cole argues in vague terms that it is possible for there to be a sale of more tobacco than recorded purchases without necessarily involving over-quota tobacco.[11] It is obvious that the

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[11]Cole suggests that he could have purchased tobacco from a warehouse or another dealer, rather than from a producer, and thus such a purchase would not implicate over-quota tobacco subject to a penalty. However, Cole's purchases from a warehouse or another dealer, like all other purchases of tobacco, are required by regulation to be recorded and reported. Accordingly, the regulatory

mere possibility asserted by Cole falls far short of demonstrating that there is no rational nexus at all. The mere statement that the fact to be presumed does not always follow necessarily from the predicate fact obviously leaves ample room for some lesser, though still rational, connection between the two. If indeed a dealer oversold for some reason other than the purchase of over-quota tobacco--for example, by inadvertently underreporting a legitimate purchase--he could avoid being assessed a penalty by adducing proof of the error.[12]

The instant case is an appeal by the government from the district court's grant of summary judgment in favor of Cole. In this posture, we need to hold only that on this summary judgment record Cole has failed to demonstrate that the regulatory presumption is irrational or otherwise invalid. We so hold. Accordingly, the judgment of the district court is reversed, and the case is remanded to the district court for further proceedings no inconsistent with this opinion.

VACATED and REMANDED.

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framework provides a ready means for Cole to rebut the presumption that he has purchased over-quota tobacco from a producer.

[12]We recognize that Cole claims his violations of the regulations stem from fraud perpetrated upon him by a third party using his dealer card. While this type of conduct may or may not be sufficient to rebut the presumption, it is not relevant to the issue now before us. There also is no argument on appeal that the regulation is unreasonable because it does not afford sufficient scope for a dealer's rebuttal of the presumption, or that the USDA has been arbitrary in declining to credit his excuses. Thus, for example, we do not have before us a case in which the USDA would not entertain rebuttal of a presumption when a dealer's records were destroyed by fire.

GODBOLD, Senior Circuit Judge, dissenting:

Graham L. Cole raises, buys, sells and warehouse tobacco. This case is a consequence of his failure to maintain correct records as a tobacco dealer. The failures relate mostly to sales of more tobacco than his records showed that he had purchased, and, to a much smaller extent, to sales not reflected in his records at all. By statute, 7 U.S.C. § 1373, for his record-keeping failure Cole could be found guilty of a misdemeanor and, upon conviction, fined up to $5,000. The Secretary of Agriculture ignored these statutory penalties and charged against Cole penalties totalling $398,756.59, some 80 times greater than the maximum § 1373 fine, based upon what the Secretary describes as a "system" or "regime" for controlling sales of tobacco by tobacco farmers in excess of quotas assigned to them. On summary judgment the district court found that the Secretary had acted beyond his statutory authority. This court reverses the summary judgment and remands the case for further consideration.

I would affirm the summary judgment.

By the Agricultural Adjustment Act of 1938 Congress provided for the orderly marketing of tobacco.[1] The Act directs the Secretary to promulgate regulations for its enforcement,[2], and

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[1]Pub.L. No. 430, 52 Stat. 31, Sec. 311(a), codified, as amended as 7 U.S.C. § 1373 *et seq.*

[2]7 U.S.C. § 1375 Regulations:

> (a) The Secretary shall provide by regulations for the identification, wherever necessary, of corn, wheat, cotton, rice, peanuts, or tobacco so as to afford aid in discovering and identifying such amounts of the commodities as are subject to and such amounts thereof as are not subject to marketing restrictions in effect under this subchapter.
>
> (b) The Secretary shall prescribe such regulations as are necessary for the enforcement of this subchapter.

he has put in place recordkeeping regulations described in the opinion of this court. Congress itself has addressed the failure of a tobacco dealer to keep and maintain correct records as required by the Secretary and has defined the consequences of such failure.

> 7 U.S.C. § 1373 Reports and records.
>
> (a) Persons reporting.
>
> This subsection shall apply to warehousemen, processors, and common carriers of [other designated commodities] or tobacco, and...all persons engaged in the business of purchasing [other designated commodities] or tobacco from producers....Any such person shall, from time to time on request of the Secretary, report to the Secretary such information and keep such records as the Secretary finds to be necessary to enable him to carry out the provisions of this subchapter [which includes § 1314(a)]. Such information shall be reported and such records shall be kept in accordance with forms which the Secretary shall prescribe. For the purpose of ascertaining the correctness of any report made or record kept, or of obtaining information required to be furnished in any report, but not so furnished, the Secretary is authorized to examine such books, papers, records, accounts, correspondence, contracts, documents, and memorandum as he has reason to believe are relevant and are within the control of such person. Any such person failing to make any report or keep any record as required by this subsection or making any false report or record shall be deemed guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than $500; and any tobacco warehouseman or dealer who fails to report such violation by

> making a complete and accurate report or keeping a complete and accurate record as required by this subsection within fifteen days after notice to him of such violation shall be subject to an additional fine of $100 for each ten thousand pounds of tobacco, or fraction thereof, bought or sold by him after the date of such violation: Provided, that such fine shall not exceed $5,000....

To understand what has happened to Cole one must understand the "regime" or "system" erected by the Secretary--the phrase is his--to control sales of excess ("over-quota") tobacco by the farmers who have produced it. The Secretary establishes a national marketing quota for each type of tobacco, which is apportioned among the states, and finally an allotment or quota is assigned to each tobacco-producing farm. 7 U.S.C. §§ 1312, 1313(a) and (b). In § 1314(a) the Act provides for a heavy penalty upon the marketing of any tobacco in excess of the marketing quota for the farm on which it is produced, to be paid by the person who acquires such tobacco from the producer. The acquiring person, who is the collector and remitter of the tax on the transaction, may recoup by deducting from the price paid to the producer an amount equivalent to the penalty.

> (a) The marketing of (1) any kind of tobacco in excess of the marketing quota for the farm on which the tobacco is produced,...shall be subject to a penalty of 75 per centum of the average market price...for such kind of tobacco for the immediately preceding marketing year. Such penalty shall be paid by the person who acquired such tobacco from the producer but an amount equivalent to the penalty may be deducted by the buyer from the price paid to the producer in case such tobacco is marketed by the producer through a warehouseman or other agent, such penalty shall be paid by such warehouseman or agent who may

> deduct an amount equivalent to the penalty from the price paid to the producer.... If any producer falsely identifies or fails to account for the disposition of any tobacco, an amount of tobacco equal to the normal yield of the number of acres harvested in excess of the farm acreage allotment shall be deemed to have been marketed in excess of the marketing quota for the farm, and the penalty in respect thereof shall be paid and remitted by the producer...."

7 U.S.C. § 1314(a). The government may collect the penalty from the acquirer or can proceed against the producer, but it is the producer against whom the penalty is imposed.

> While the statute requires the buyer, agent or warehouseman to pay the penalty, it is clear that the imposition of the penalty is on the offending producer.

U.S. v. Whittle, 287 F.2d 638, 640 (4th Cir.1961).

The penalties charged against Cole were calculated by the § 1314(a) measure, 75% of average market price.

The Secretary has adopted regulations that he contends authorize him to impose the § 1314(a) penalty against a tobacco dealer based upon his failure to keep proper records of tobacco he has "resold."

> (d) Dealer's tobacco. The...tobacco resales by a dealer (as shown or due to be shown on Form MQ-79), which are in excess of his total prior...tobacco purchases (as shown or due to be shown on Form MQ-79) shall be considered to be a marketing of excess tobacco and penalty thereon

> shall be due at the time the marketing takes place which results in the excess....
>
> (e) Resales not reported. Any resale of tobacco which is required to be reported by a warehouseman or dealer, but which is not so reportedwithin the time and in the manner required, shall be considered to be a marketing of excess tobacco, unless and until such warehouseman or dealer furnishes a report of such resale which is acceptable to the State executive director. The penalty thereon shall be paid by the warehouseman or dealer who fails to make the report as required.

7 C.F.R 725.94(d), (e) (1989 ed.); 726.88(d), (e) (1989 ed.) (emphasis added).[3]

The action taken by the Secretary against Cole is beyond his statutory authority for several reasons.

(a) By § 1373 Congress has directly spoken to the failure of a tobacco dealer to maintain records and has assigned the consequences of that failure.

(2) The "regime" or "system" put in place by the Secretary to control sales of over-quota tobacco sweeps too broadly. The decision by this court has not even addressed this issue.

(3) Imposition of the § 1314(a) penalty conflicts with Gold Kist V. USDA, 741 F.2d 244 (11th Cir.1984).

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[3]It is worth noting that neither regulation mentions §1314(a) but only "penalty" and "the penalty thereon."

(4) This court sustains the validity of regulations (d) and (e) on the ground that they merely create a rebuttable presumption that Cole has not shown to be irrational. Regulation (d), on which most of Cole's penalty is based, contains no right to rebut, and the presumption of regulation (e) is not rational.[4]

(1) Preemption by Congress.

Chevron U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), is the controlling case in judicial review of agency action. In Chevron the Supreme Court set forth a two-step test:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue,

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[4]The penalty was imposed for two different types of tobacco, flue-cured and burley, and for three different marketing years:

> -1985-86--penalty of $682.72 assessed for excess marketing of flue-cured tobacco based on 7 C.F.R. § 725.94(d).
>
> -1986-87--penalty of $28,033.20 assessed for excess marketing of burley based on 7 C.F.R. §726.88(d) and (e); and penalty of $318,163.02 assessed for excess marketing of flue-cured tobacco based on C.F.R. § 725.94(d).
>
> -1987-88--penalty of $51,877.65 assessed for excess marketing flue-cured tobacco. It is unclear whether this penalty was based on 7 C.F.R. § 725.94(d) or (e) or both.

> the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43, S.Ct. at 2781-82 (footnotes omitted). This court has ignored the first step of Chevron's test. It assumes without discussion that Congress has authorized the Secretary to regulate the field of violations of record-keeping by dealers, or has remained silent as to it, and goes directly to the second step of whether agency action is reasonable.

It does not answer the Chevron first-level inquiry to say that the Secretary's regulations do not penalize the failure to keep records but rather penalize a purchaser in a transaction in which he has acquired over-quota tobacco from a purchaser. In § 1373 Congress defined the consequence of an improper record--fines and a misdemeanor conviction. The Secretary, by regulation, has assigned different (and for Cole, catastrophic) consequences. I discuss below the validity of the presumptions on which the Secretary and this court rely. But at the first level, without reaching that inquiry, the Secretary's regulations are beyond his authority because they intrude on both subject matter and assigned consequences that Congress has preempted.

(2) The "regime" or "system" sweeps too broadly.

Assuming that the Secretary's "regime" does not fall at the first level of Chevron, it fails at the second level. It is unreasonable because it sweeps too broadly.

Congress has elected to regulate the marketing of over-quota tobacco through § 1314(a) and the penalties for record-keeping failure by § 1373(a). It has authorized the Secretary to

promulgate regulations for enforcement of the Act. But that authority must be exercised in the light of Congress' specific elections under § 1314(a) and § 1373(a).

The Secretary has made no effort to bring himself within, or to act consistently with, § 1373(a) but simply has ignored it. He has attempted to bring himself within § 1314(a) by regulations defining in § 1314(a) terms the events sought to be regulated and the participants in that event.

First, as to the participants: The target of regulations (d) and (e) is "a dealer." By regulation the Secretary has defined a dealer in tobacco as "[a] person who engages to any extent in acquiring or selling tobacco in the form normally marketed by producers." 7 C.F.R. 725.51(g). Of course, one who buys tobacco from a producer thereof is, in the language of § 1314(a), a "person who acquire[s] such tobacco from the producer," and such "acquirer" may be engaged, but is necessarily engaged, in the business of buying and selling tobacco. The Secretary has chosen the dealer as the "throat" or point of contact at which the "regulatory regime" will operate to control against marketing by producers of over-quota tobacco.

> Thus, the regulatory regime is designed to control against producers' marketing in excess of quotas by ensuring that dealers will account for all purchases and remit or collect the penalty amount which is appropriate.

Gov't.Brief, p. 8. The Secretary has the power to select the dealer as the control point. He can require the dealer to keep records, and § 1373 prescribes a penalty for the dealer's failure to do so. But the issue before us concerns no power to select but the limits on power to impose a penalty. The act of designating the dealer as the point of contact for implementing control does not impose upon the dealer, as dealer, the obligations placed by § 1314(a) upon one who acquires from a producer. A dealer is obligated to

collect and remit only if he is a § 1314(a) acquirer then only to be the extent of his acquisition.

Faced with the necessity of inferring a dealer's status [as acquirer] in a [presumed] purchase transaction--from the dealer's failure to keep records of a resale made at a later date--the Secretary states over and over again that the Act itself assigns to the dealer the responsibility to collect and remit the § 1314(a) penalty for over-quota tobacco. E.g., Gov't.Brief, pp. 2, 15, 16, 22, 24 25, 29, 33. These are misstatements. The Act assigns the responsibility to the § 1314(a) acquirer. The dealer is responsible only if, and to the extent, he is a § 1314(a) acquirer.

Second, with respect to the action or event sought to be regulated: The statutory marketing event is a producer-to-acquirer sale with a penalty collected from the acquirer. The event covered by the regulations takes place upon coalescing of two occurrences--a resale by a dealer and a failure of the dealer to keep records--neither of which is addressed by § 1314(a). These occurrences take place downstream from any producer-to-acquirer transaction, and any number of successive transactions and participants may intervene and be subject to the regulations. To bridge the gap between the § 1314(a) event and the regulated event(s) the Secretary has promulgated in (d) a presumption springing from resales exceeding recorded purchases, and in (e) a presumption springing from unreported sales, each providing that the event "shall be considered to be a marketing of excess tobacco."

The Secretary, by applying regulations (d) and (e)--in charging the penalties to Cole, in Cole's administrative appeals, in the district court, and in this court--has not identified as over-quota tobacco any of the tobacco that is the subject of the penalties, nor has he identified the producer of any of the tobacco. He has not identified any producer-to-acquirer transaction participated in by Cole, or indeed any producer-to-acquirer transaction that has occurred. Nor has he brought forward evidence of whether any of the tobacco used as the basis for calculating the penalties against

Cole has previously been the subject of a penalty arising from any producer-to-acquirer transaction as described in § 1314(a). His position simply is that he need not do any of these things.

The sweep of the regulatory scheme may be seen by its impact. Application of it to a dealer establishes several things:

--That some one or more unidentified producers have sold to some one or more unidentified purchasers over-quota tobacco.

--That the penalties that should have been paid on one or more of those producer-to-acquirer transactions were not paid by the purchaser(s).

--That the penalties due for any of the [presumably] over-quota tobacco have not been paid by any downstream owner of any of the tobacco.

--That some or all of the [presumably] over-quota tobacco that was the subject matter of one or more producer-to-acquirer transactions has come into the hands of the dealer and has been resold by him.

--That all tobacco resales, the dealer's records of which do not comply with (d) or (e), are resales of over-quota tobacco that meet the foregoing conditions.

--That a recorded paper trail exists in the tobacco industry that in fact would reveal to a dealer who purchases tobacco but is not the purchaser in the underlying § 1314(a) transactions that tobacco he is acquiring is over-quota tobacco on which no penalty has been paid.

The power of the Secretary to make regulations that enforce the Act does not sweep this broadly, whether done by

creation of a presumption or otherwise.[5] It does not answer to say that (d) and (e) do not impose a penalty but only "supply evidence" that a dealer has engaged in a § 1314(a) transaction involving over-quota tobacco. As I discuss below, regulation (d) operates directly to create a consequence--"a penalty thereon shall be due"--and provides no right to rebut. With respect to (e), describing it as "merely evidentiary" is but a plan on words. It creates a consequence--"the penalty thereon shall be paid"--subject to a right to submit evidence that will satisfy the department. If this consequence is valid at all it is only to the extent the presumption is valid.

(3) Imposition of the § 1314(a) penalty conflicts with Gold Kist.

In Gold Kist, Inc. v. USDA, 741 F.2d 344 (11th Cir.1984), we distinguished between mere administrative sanctions and penalties, civil or criminal. We held that a statute must plainly establish a penal sanction in order for an agency to have authority to impose a penalty. At issue in the case was whether the USDA had authority to impose civil monetary penalties relating to marketing and handling peanuts. Under the peanut price support program in effect at the time, there were two categories of peanuts: "quota peanuts," those produced under a quota and allotment granted the farmer under the federal peanut program, and "additional peanuts," those grown in addition to a farmer's allotment and quota. While there existed specific statutory authority, 7 U.S.C. § 1359(g)[6], for marketing penalties relating

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[5]The impact of the regulatory scheme is accented by Cole's contention that his failures of record-keeping arose from fraud perpetrated upon him by a third party using his dealer cards. This court, n. 12, says this is irrelevant and leaves upon whether proof of fraud can rebut the presumption.

[6]7 U.S.C. § 1359(g) provided, in relevant part:

> Upon a finding by the Secretary that the peanuts marketed from any crop for domestic edible use by a handler are larger

to "quota peanuts," similar statutory authority for marketing penalties relating to "additional peanuts" did not exist. The USDA argued that because of its general authority to regulate peanut marketing it had authority to set the conditions under which "additional peanuts" were handled and that this authority necessarily encompassed the power to assess monetary penalties.

We held: (a) that an agency may impose administrative sanctions not specifically imposed by statute so long as the penalty is reasonably related to the purposes of the enabling legislation; and (2) that an agency's power to impose penalties and penal statutes is to be strictly construed; and (3) that one is not to be subjected to a penalty unless the words of the statuteplainly impose it. 741 F.2d at 348. We concluded that the penalties imposed on Gold Kist were invalid.

In Gold Kist the penalty imposed under the same marketing statute on a different classification of peanuts were held not to plainly impose a penalty on the classification of peanuts in question. In the present case, as I have pointed out, the Act does not plainly impose the § 1314(a) penalty on a dealer except to the extent he has acquired from a producer, nor plainly impose it on his function as seller, nor upon a resale transaction. It does not plainly impose that penalty on transactions the subject matter of which is not shown to be over-quota tobacco and the source of which is not shown to be a producer, nor upon a transaction involving tobacco with respect to which it is not known whether a producer-to-acquirer penalty has already been paid. And, last, the

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in quantity or higher in grade or quality than the peanuts that could reasonably be produced from the quantity of peanuts having the grade, kernel content, and quality of the quota peanuts acquired by such handler from such crop for such marketing, such handler shall be subject to a penalty equal to 120 pe centum of the loan level for quota peanuts on the peanuts which the Secretary determines are in excess of the quantity, grade, or quality of the peanuts that could reasonably have been produced from the peanuts so acquired.

statute does not plainly impose the § 1314(a) penalty upon failure to keep records.

The Secretary concedes that there is no express authorization for regulations (d) and (e).

> [E]ven though there is no express authorization in the Act for the regulations challenged in this case, the regulations plainly honor the provisions of the Act, and achieve a result in accord with the statutory scheme. Accordingly, the regulations must be sustained by this Court.

Gov't.Brief, p. 29 (emphasis added). If the statute does not authorize the regulations it does not authorize imposition of a penalty based on those regulations. It would stand Gold Kist on its head to hold that regulations not specifically authorized by statute can serve to make specific a statutory penalty that is not plain and specific.[7]

Gold Kist fits into the Chevron analysis. The first step in Chevron's two-part inquiry requires a reviewing court to determine whether Congress had a clear intent as to a particular matter. The Supreme Court said that "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect," Chevron, 467 U.S. at 843 n. 9, 104 S.Ct. at 2782 n. 9. Gold Kist provides us a tool of statutory construction: penal statutes are strictly construed; the imposition of a penalty requires that the words of the statute plainly impose it. As I have set out, the words of this statute do not plainly impose the § 1314(a) penalty on a dealer in Cole's position.

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[7]The above concession by the Secretary confirms what is evident--that nothing in the statute indicates an intent by Congress to trigger penalties by looking to resales downstream from the producer-to-acquirer transaction.

This court holds that Gold Kist is inapplicable because a presumption is involved. The presumption is created by regulation, not by statute. If that interpretation is accepted an agency can expand its power over areas it can regulate simply by presuming that things or events it wants to have power to regulate constitute something the agency does have power to regulate. An agency may not give itself "clear congressional authorization" to act in or regulate an area simply by presuming that things outside its authority constitute things within its authority.

(4) The failure of the presumption.

The Secretary has attempted to cabin analysis to a single question:

> Whether the Agricultural Adjustment Act of 1938 permits the Secretary of Agriculture to promulgate regulations which creates [sic] a rebuttable presumption that a dealer in tobacco has participated in marketing in excess of marketing quotas, where the dealer has failed to report the source of tobacco sold and the dealer has sold more tobacco than reported purchased.

Gov't.Brief, p. 2. This court has accepted that argument and, disregarding other issues, decides that penalties against Cole are valid because Cole has not shown that the presumption is irrational. As I have spelled out, this case is neither so narrow nor so easy.

Turning, however, to the presumption issue I have already pointed out that (d) contains no provision for rebuttal. It unequivocally defines the consequences of a failure to keep records. To create a right to rebut in (d) this court has relied upon the principle of an agency's interpreting its own regulation and the Secretary's willingness in this instance to accept from Cole rebuttal evidence that tobacco he resold was not over-quota. But the issue

before us is not validity of (d) as applied; it is whether (d) as enacted is beyond the authority of the Secretary. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945), and Martin v. Occupational Safety and Health Rev. Comm'n, 499 U.S. 144, 157, 111 S.Ct. 1171, 1179, 113 L.Ed.2d 117 (1991), involved administrative interpretation of ambiguous regulations where the meaning of words used in the regulations was in doubt. Regulation (d) is not ambiguous and contains no reference to a right to rebut. The Secretary's sold ground for sustaining (d) is its alleged rebuttable presumption. Since (d) contains no presumption and no right to rebut, if Cole is not entitled to 100% relief he is at least entitled to relief from penalties assessed under (d).

The presumption of (e) places on Cole both the burden of coming forward with evidence and the burden of persuasion. Undergirding all presumptions are judicial assessments of probabilities or likelihood that permit inferences to be drawn without proof in the usual sense. I have set out in (2) the elements that necessarily must be accepted without proof in Cole's case. They are too sweeping and too far from the necessary elements of proof to be intuitively rational. Moreover, with respect to probabilities or likelihood, we do not know whether as a general proposition the paper trail system that was in place when the case began was being complied with and would have revealed the information that this court says was available. We do know that the system in place when this case began has been revamped. Also, we do not know how much over-quota tobacco was in the stream of tobacco marketing, whether 10% or 80% of the total; if hypothetically 10% was over-quota there is little likelihood that sales made by Cole and not recorded were in fact over-quota tobacco.

This court's justifications for the validity of the presumption are in large part circular. To the question whether it is irrational to presume that tobacco sold by a dealer without proper record is over-quota tobacco, the court answers that this

fact is presumed. (Mss. p. 3754). To the point that a dealer resale may not validly be presumed to evidence a producer-to-acquirer sale, the court responds that the presumption answers that problem. (Mss. p. 3753). The rationality of a presumption cannot be established by the fact of its existence. Finally, the court relies upon its view that there is nothing intuitively irrational about the presumption and, as support, gives a hypothetical involving collusion between an over-quota producer and a fraudulent acquirer.

The district court gave this case a decent burial. I would leave it there.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
THOMASVILLE DIVISION

GRAHAM L. COLE,	)	**CIVIL ACTION FILE**
	)	**NO. 91-4-THOM**
	)	
Plaintiff	)	
	)	
Vs.	)	
	)	
UNITED STATES	)	
DEPARTMENT OF	)	
AGRICULTURE and	)	
AGRICULTURAL	)	
STABILIZATION AND	)	
CONSERVATION SERVICE,	)	
	)	
Defendants	)	

MEMORANDUM AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

This is an appeal from an adverse administrative decision dated December 17, 1990, relating to tobacco marketing penalties assessed by the United States Department of Agriculture and Agricultural Stabilization and Conservation Service. The Plaintiff has filed a motion for summary judgment and Defendants have filed a counter-motion for summary judgment and briefs have been submitted by counsel in support of their respective positions, and it appears that only a legal question is presented.

In four separate letters dated March 6, 1990, the Georgia State ASCS Office notified the Plaintiff that he was being assessed

with penalties totalling $398,756.59 for oversales of tobacco for the years 1985-1986, 1986-1987, and 1987-1988. In each letter the Defendants advised the Plaintiff that the penalties were being assessed pursuant to certain provisions of the Code of Federal Regulations relating to flue-cured tobacco and burley tobacco.

The Plaintiff does not dispute the fact that the regulations cited by the Defendants in the respective letters do provide for the assessment of penalties. However, the Plaintiff contends that the Defendants have no statutory authority for promulgating regulations which authorize levying of a monetary penalty for oversale of tobacco by a dealer.

The Court has given careful consideration to the briefs submitted and has concluded that neither § 1314(a) of Title 7 of the United States Code nor any other provision of the Agricultural Adjustment Act of 1938 authorizes the assessment of penalties on dealers for the oversale of tobacco, that being the type of penalty here being imposed by the Defendants on the Plaintiff. The penalty contemplated in § 1314 is a penalty on "producers" for marketing more tobacco than they are allotted to sell. It is true that under § 1314 if the producer is guilty of marketing excess tobacco the government may collect the production penalty from the person (a dealer or otherwise) who bought the excess tobacco from the producer. In that situation, however, the fine is clearly being assessed against the producer although the producer's fine is being collected from the buyer. In contrast, the situation here involves an attempt by the Defendants to assess a penalty directly against the Plaintiff, a dealer, without first identifying any evidence of excess tobacco sales by the producer to the Plaintiff.

The penalty provided for in § 1314(a) is clearly a penalty upon the "producer" of tobacco. See United States v. Whittle and Hairston, 287 F.2d 638 (4th Cir. 1961). It is also clear from the language of the statute that the burden is upon the producer to identify any tobacco that is in excess of his marketing quota, and in the event the producer does not identify the tobacco as "excess

tobacco" the statute makes provision as to how the government is to identify excess tobacco from a tobacco farm.

In this case, contrary to the statutory scheme, instead of levying a fine against a producer who may have harvested more than his quota of tobacco for any of the years in question, Defendants have levied a fine against a dealer based solely upon the fact that the dealer sold more tobacco than he purchased. The point being that the statute makes no provision for the levying of a penalty upon a dealer of the sale of more tobacco than he has purchased.

That Congress intended only to penalize excess marketing at the producer level is demonstrated when one considers the practicalities of the situation. To do otherwise would require all purchasers at auction to check the ASCS records to determine how much tobacco the producer can produce and then check all warehouse records to determine how much tobacco that person has sold. That would be an onerous burden and Congress did not see fit to impose that burden upon a dealer. Instead, § 1373 of Title 7 requires only that dealers report all purchases and sales to the government, and unlike § 1314's producer penalty provisions, § 1373 does not authorize any penalty to be assessed directly against the dealer.

Consistent with the foregoing, the Court sustains the Plaintiff's motion for summary judgment and denies the Defendants' motion for summary judgment. An appropriate judgment will be entered.

IT IS SO ORDERED, this 17th day of December, 1992.

S/J. ROBERT ELLIOTT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
THOMASVILLE DIVISION

GRAHAM L. COLE,	)	**CIVIL ACTION FILE**
	)	**NO. 91-4-THOM**
	)	
Plaintiff	)	
	)	
Vs.	)	
	)	
UNITED STATES	)	
DEPARTMENT OF	)	
AGRICULTURE and	)	
AGRICULTURAL	)	
STABILIZATION AND	)	
CONSERVATION SERVICE,	)	
	)	
Defendants	)	**JUDGMENT**

The within matter having come on for hearing before the Court pursuant to a Motion for Summary Judgment filed by the Plaintiff and a Cross-Motion for Summary Judgment filed by the Defendants and the Court having entered an order on the 17th day of December, 1992 granting the Motion for Summary Judgment on behalf of the Plaintiff and denying the Cross-Motion for Summary Judgment by the Defendant, it is, therefore, the order of this Court that the penalties assessed by the Defendants against the Plaintiff are declared void and unenforceable.

Further, it appearing to the Court that the Plaintiff posted a cash bond in the amount of $200,000.00 with the U. S. District Court for the Middle District of Georgia on the 1st day of October, 1990 and that the Plaintiff would be paid interest on said

amount pursuant to an order of this Court dated September 21, 1990, the Clerk for the United States District Court for the Middle District of Georgia is authorized and directed to pay the sum of $200,000.00, plus the accrued interest on said amount to the Plaintiff.

Further, it appearing to the Court that the Plaintiff executed a security deed to the United States of America, the same being dated the 27th day of September, 1990 and filed of record in Deed Book 291, Page 78 in the office of the Clerk of Superior Court of Thomas County, Georgia, which security deed was held as additional collateral for this potential obligation, the Clerk for the United States District Court for the Middle District of Georgia is hereby directed to mark said security deed "Satisfied and the Clerk of Superior Court of Thomas County, Georgia is hereby authorized to cancel said deed of record. This 4th day of January, 1993."

This Judgment is herewith entered this 31st day of December, 1992.

S/J. Robert Elliott
JUDGE, UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT
OF GEORGIA

Mr. C. Saxby Chambliss
Moore & Chambliss
Attorneys and Counsellors at Law
P. O. Box 190
Moultrie, Georgia 31776-0190

Dear Mr. Chambliss:

This replies to the appeal filed on behalf of your client, Mr. Graham L. Cole, concerning Georgia State ASC Committee determinations assessing marketing quota penalties under both the flue-cured tobacco allotment and marketing quota program and burley tobacco marketing quota program.

Specifically, the Georgia State Committee determined that your client, operating as Peachtree Tobacco Company (Peachtree) under Form MQ-79-2, USDA Tobacco Dealer Identification Card (dealer card), number 2036, had excess tobacco resales and owed penalties as follows:

Tobacco	Year	Excess Resale Pounds	Penalty Amount Owed
Flue-Cured	1985/86	502	$ 682.72
	1986/87	246,638	$ 313,163.02
	1987/88	45,111	$ 51,877.65
Burley	1986/87	23,361	$ 28,033.20

Through an appeal(s) to the Georgia State Committee for reconsideration of its initial determination(s), your client was afforded the opportunity to meet with the committee and furnish information as to why he believed the penalties were improper. Following a review of the record, the State committee concluded that Mr. Cole had furnished no additional evidence that would warrant relieving him of being held responsible for the tobacco transactions under dealer number 2036. Thus, by letters of July 19, 1990, the State committee affirmed the above penalties as previously assessed and denied the appeal(s). You have appealed the Georgia State Committee's determination with respect to each of the above marketing penalties.

For reconciliation of tobacco dealer reports as required by the applicable State ASCS offices, the Kansas City Management Office (KCMO) provides printouts following the end of the marketing year reflecting tobacco purchases and/or resales for a particular dealer in all States involved with flue-cured and burley tobacco activity.

The evidence in the record reflects that for dealer number 2036, when the total purchases of flue-cured tobacco as shown or due to be shown on form MQ-79, Dealer's Report, were compared with the flue-cured tobacco resales as shown or due to be shown on form MQ-79, excess sales occurred as reflected above. Likewise, for burley tobacco during the 1986/87 marketing year, resales exceeded purchases as shown above. The excess resales in question were revealed when records and reports submitted by your client under dealer number 2036 were compared to tobacco transactions reflected for dealer number 2036 on the KCMO printout. (It should be noted that excess resales of flue-cured tobacco for the 1987/88 marketing year were reduced from 72,508 pounds to 45,111 pounds as a result of corrections made in purchase date(s) involving tobacco purchases your client made from A.C. Monk, tobacco dealer number 4201).

The following testimony was presented by your client as the appeal hearing conducted in Washington, D.C., on October 31, 1990.

Mr. Cole's primary argument is that although excess tobacco resales as reflected above were made using his dealer number 2036, the excess tobacco did not belong to him (or Peachtree) nor did he profit from monies received from such resales. Your client questions the appropriateness of ASCS assessing penalties more than 3 years after the alleged violation. He also questions the refusal of ASCS to accept corrections involving him and Mr. Glenn Martin, dealer number 5103, on 2 MQ-80s (Daily Warehouse Summary) when approximately 32 other MQ-80s were corrected and accepted.

Your client admits that a business relationship with Mr. Martin existed during the years involved (1985 through 1988) and admits that Mr. Martin was allowed to maintain his (Cole's) dealer card for resale of tobacco belonging to Peachtree. However, your client argues he was unaware at the time the violations were occurring that his dealer card was being used to market tobacco other than that belonging to Peachtree. Finally, your client argues that copies of canceled checks disbursed as payment for the excess tobacco in question clearly reflect that someone else endorsed the name Graham Cole. This was argued in support of your client's denial that he received monetary benefit from this misuse of his dealer card.

Regulations governing the administration of the flue-cured tobacco allotment and marketing quota program and the burley tobacco marketing quota program are found at 7 CFR Parts 725 and 726, respectively. These regulations provide in part as follows:

For Flue-Cured Tobacco

7 CFR Section 725.94 Penalties considered to be due from warehousemen, dealers, buyers, and others excluding the producer.

* * *

(d) Dealer's tobacco. The flue-cured tobacco resales by a dealer (as shown or due to be shown on Form MQ-79), which are in excess of his total prior flue-cured tobacco purchases (as shown or due to be shown on Form MQ-79) shall be considered to be a marketing of excess tobacco and penalty thereon shall be due at the time of marketing . . . Penalty due which is not withheld by a warehouseman shall be remitted weekly by the dealer . . .

For Burley Tobacco

7 CFR Section 726.68 Penalties considered to be due from warehousemen, dealers, buyers, and others excluding producers.

* * *

(d) Dealer's tobacco. The burley tobacco resales by a dealer (as shown or due to be shown on Form MQ-79), which are in excess of his total prior burley tobacco purchases (as shown or due to be shown on MQ-79) shall be considered to be a marketing of excess tobacco and penalty thereon shall be due at the time of marketing . . . Penalty due which is not withheld by a warehouseman shall be remitted weekly by the dealer . . .

According to this regulatory scheme, a marketing penalty is assessed against the owner of the dealer card when tat card is used to transact the resale of excess tobacco. Neither a finding of intent nor profit on the part of the card owner is necessary. Nothing in ASCS's regulations prohibits ASCS from assessing marketing penalties for 3 or more past years.

Mr. Cole presented no evidence to challenge the fact that his dealer card was used for resale of excess tobacco. Neither did Mr. Cole present any evidence to substantiate why the existing excess resale should also be corrected (as were some other transactions).

He addressed this issue with the rhetorical question "If you corrected some (excess resales), why not all?" No evidence in the record exists which indicates that the prior corrections (and refusal to correct other resales) were improper or not correct.

Based on the above findings of fact and consideration of your client's testimony, we find that the Georgia State Committee acted properly in determining that resales in excess of purchases for the years and types of tobaccos as aforementioned under dealer number 2036 constituted resales of excess tobacco subject to the marketing penalties as assessed. Notwithstanding your argument that someone else used Mr. Cole's dealer card to market excess tobacco without his expressed approval, your client is liable for all transactions which are reflected on his dealer card (absent creditable evidence which shows that such should not be the case). Thus, in accordance with the above-cited regulations, the critical evidence is that the dealer card issued to your client was used to market excess tobacco. Mr. Cole, by his own admission, voluntarily gave Mr. Martin his dealer card, and by not demanding its return, either knowingly approved or acquiesced to Mr. Martin's retention and continued use of the card. Because Mr. Cole is the owner of the card he is responsible for excess resales transacted with the card.

We conclude there is not evidence in the record which would warrant a determination different from the Georgia State Committee's determination regarding the facts and assessment of marketing penalties as reflected and set forth above. Therefore, we find that the Georgia State Committee's determination was proper and, hereby, determine that the appeal with respect to each of the marketing penalties should be denied.

This concludes the administrative appeal rights afforded at 7 CFR Part 780, Appeal Regulations.

Sincerely,

S/ THOMAS A. VONGARLEM, ASST.

Deputy Administrator,
State and County Operations

cc SED, Georgia
Maurice E. Reddick, 2741-S
SEA, 3717-S
AAS, 2741-S
INFO, 3702-S
DAPPD, 3090-S
DASCO, 3096-S
ASCS/AAS/MAURICE E. REDDICK/447-6353/sks/12-06-90
AAS-90-1979/FINAL ____(DEC# 4485)

APPEAL SUMMARY

PERSONAL HEARING

APPELLANTS:	Graham Cole
REPRESENTED BY:	Attorney C. Saxby Chambliss
CITY/STATE:	Moultrie, Georgia
MATTER OF APPEAL:	1985, 1986 and 1987 Flue-cured Tobacco & 1986 Burley Tobacco Marketing Quota Penalties
DATE, TIME & PLACE:	October 31, 1990; 10:00 a.m.; Room 5758-S; USDA Washington, D.C.

BACKGROUND

The appellant, through counsel, is appealing a Georgia STC determination that as owner of Peachtree Tobacco Company and operating under dealer identification number 2036, he had excess resales of flue-cured tobacco during the marketing years 1985/86, 1986/87 and 1987/88; and excess burley resales for the marketing year of 1986/87.

For each of the years, the Georgia STC determined resales exceeded the purchases as follows:

Flue-Cured Violation	Marketing Year	Pounds in
	1985/86	**502**
	1986/87	**246,638**
	1987/88	**45,111**

Burley Violation	Marketing Year	Pounds in
	1986/87	23,361

By letter of July 19, 1990, from the Georgia STC, Mr. Cole was advised of flue-cured tobacco penalties as follows: 1985/86, $682.72; 1986/87, $318,163.02 and 1987/88, $51,877.65, and for burley tobacco in 1986/87 $28,033.20.

For details, see Georgia STC summaries.

Maurice E. Reddick
Hearing Officer
Appeals Staff

R-1 APPEAL OF MARKETING PENALTY FOR EXCESS RESALES OF FLUE-CURED TOBACCO - PEACHTREE TOBACCO COMPANY, DEALER 2036 - 1985-86 MARKETING YEAR

Flue-Cured Tobacco Allotment and Marketing Quota Regulations 7 CFR 725 provide as follows with respect to purchases and resales of FC tobacco by dealers:

Section 725.94(d) Dealer's tobacco. The flue-cured tobacco resales by a dealer (as shown or due to be shown on Form MQ-79), which are in excess of his total prior flue-cured tobacco purchases (as shown or due to be shown on Form MQ-79 shall be considered to be a marketing of excess tobacco and penalty thereon shall be due . . .

A summary of the records and reports submitted by Dealer 2036, Peachtree Tobacco Co., owned by Graham L. Cole, for the 1985-86 marketing year, along with the KCMO printout with FC tobacco, showed that resales exceeded total purchases by 502 pounds.

Dealer 2036 was advised on 3/6/90 that the pounds resold were in excess of the purchases, were considered marketings of excess tobacco, and subject to a penalty of $682.72 (502 pounds x $1.36 per pound) unless satisfactory proof was furnished to the STC within 15 days that the excess resales did not represent excess marketings.

Dealer contested the penalty on 3/19/90 based on the fact that ASCS Handbook requires records to be retained for 3 years after the end of the marketing year and that the 3 years had expired in 1989.

On 4/6/90, dealer was notified of an appointment on 4/16/90 with the STC. By telephone on 4/12/90, he requested

postponement of the nearing due to insufficient time to obtain needed records.

On 4/10/90, by letter, dealer advised that he had no records available for the 1985-86 marketing year and requested that copies by furnished.

On 4/13/90, copies of all FC dealer records for 1985/86 FC marketing year were mailed as requested.

On 5/15/90, dealer was notified that the STC hearing had been rescheduled. Dealer attended the 6/20/90 STC meeting and was given the opportunity to present any additional information that would be helpful to the STC in making their determination regarding assessment of marketing penalty. He stated no additional information was available and agreed to pay the $682.72 which represents 502 pounds excess resales x $1.36 penalty rate.

Also attending the STC meeting were Dallas Smith, Director, TPD, Washington, and Margaret P. Williams, STO Tobacco Program Specialist. A verbatim transcript of the hearing was prepared by an official reporter of the Heritage Reporting Corporation, Washington, D.C.

The STC determined that the penalty of $682.72 would be assessed against Dealer 2036 inasmuch as no additional information was presented and dealer agreed to pay the penalty. The STC determined that dealer be afforded appeal rights to DASCO, Washington, D.C.

R-2 APPEAL OF MARKETING PENALTY FOR EXCESS RESALES OF BURLEY TOBACCO - PEACHTREE TOBACCO COMPANY, DEALER 2036 - 1986 MARKETING YEAR

The Burley Tobacco Marketing Quota Regulations at 7 CFR Part 726 provide as follows with respect to purchases and resales of Burley tobacco by dealers:

Section 726.88(d) Dealer's tobacco. The burley tobacco resales by a dealer (as shown or due to be shown on Form MQ-79), which are in excess of his total prior burley tobacco purchases (as shown or due to be shown on MQ-79) shall be considered to be a marketing of excess tobacco and penalty thereon shall be due . . .

Section 726.88(e) Resales not Reported. Any resale of tobacco which is required to be reported by a warehouseman or dealer, but which is not so reported within the time and in the manner required, shall be considered to be a marketing of excess tobacco, unless and until such warehouseman or dealer furnishes a report of such resale which is acceptable to the State Executive Director. The penalty thereon shall be paid by the warehouseman or dealer who fails to make the report as required.

A review of the records and reports submitted to our Kansas City Management office by various burley tobacco warehouses for the 1986-87 burley marketing year shows that Peachtree Tobacco Company, owned by Graham L. Cole, resold 23,361 pounds of burley tobacco at Fourth Street Tobacco Warehouse (31217), Lexington, Ky.

A review of the State Office files did not reflect any activity reported by Peachtree Tobacco Company during the 1986-87 burley marketing year; however, copies of MQ-80's for various sale days were furnished by the Kentucky State ASCS Office.

The resale pounds reported by Warehouse 31217 are considered marketing of excess tobacco as no purchases were reported on MQ-79 for the 1986-87 burley year. The dealer was notified on 3/6/90 that the 23, 361 pounds were subject to a penalty of $28,033.20 (23,361 x $1.20 per pound) unless satisfactory proof could be furnished within 15 days to show that the excess resales do not represent excess marketings.

Dealer contested the penalty on 3/19/90 stating he did not have any activity in burley tobacco during 1986 and that the subject tobacco was not sold by or for Peachtree Tobacco Company. His letter stated he had contacted Warehouse 31217 in Lexington, Ky. requesting copies of checks issued for the sale of this tobacco.

Dealer was notified on 4/6/90 that the STC would consider his appeal of the penalty on April 16.

On 4/12/90, dealer requested postponement of the hearing due to insufficient time to obtain needed records.

By letters dated 4/10/90 and 5/22/90, dealer furnished copies of checks issued by Fourth Street Tobacco Warehouse for respective sale days in question. All checks were payable to Peachtree Tobacco Company. Mr. Cole contends these checks do not bear his endorsement nor were they deposited to his bank account. Copies of these checks were provided for STC review.

On 5/15/90, dealer was notified that the STC hearing had been rescheduled. Dealer attended the 6/10/90 meeting and was given the opportunity to present any additional information that might be helpful to the STC in making their determination regarding assessment of the marketing penalty for the 1986 burley marketing year.

Also attending the STC meeting were Dallas Smith, Director, TPC, Washington, and Margaret P. Williams, STO Tobacco Program Specialist. A verbatim transcript of the hearing was prepared by an official reporter of the Heritage Reporting Corporation, Washington, D.C.

After carefully considering the evidence presented by Mr. Cole and information contained in the State Office files, the STC determined that the evidence presented was not sufficient to prevent assessment of a marketing penalty in the amount of $28,033.20 which represents 23,361 pounds x $1.20 penalty rate.

The STC determined the penalty of $28,033.20 should be assessed against Peachtree Tobacco Company and that the dealer should be afforded appeal rights to DASCO, Washington, D.C.

R-3 APPEAL OF MARKETING PENALTY FOR EXCESS RESALES OF FLUE-CURED TOBACCO - PEACHTREE TOBACCO COMPANY, DEALER 2036 - 1986-87 MARKETING YEAR

Flue-Cured Tobacco Allotment and Marketing Quota Regulations at 7 CFR 725 provide as follows with respect to purchases and resales of FC tobacco dealers:

Section 725.94(d) Dealer's Tobacco. The flue-cured tobacco resales by a dealer (as shown or due to be shown on Form MQ-79), which are in excess of his total flue-cured tobacco purchases (as shown or due to be shown on Form MQ-79) shall be considered to be marketing of excess tobacco and penalty thereon shall be due . . .

Section 725.94(e) Resales not Reported. Any resale of tobacco which is required to be reported by a warehouseman or dealer, but which is not so reported within the time and in the manner required, shall be considered to be a marketing of excess tobacco, unless and until such warehouseman or dealer, furnishes a report of such resale which is acceptable to the State Executive Director. The penalty thereon shall be paid by the warehouseman or dealer who fails to make the report as required.

A summary of the records and reports submitted by Dealer 2036, Peachtree Tobacco Co., owned by Graham L. Cole, for the 1986-87 marketing year, along with the KCMO printout reflecting any activity for this dealer in all states involved with FC tobacco, showed that resales exceeded total purchases by 246,638 pounds.

MQ-79's (Dealer's Record) submitted by the dealer to the STO did not reflect these resales; however, MQ'80's have been furnished by NC and VA State Offices.

Dealer 2036 was advised on 3/6/90 that the pounds resold were in excess of the purchases, were considered marketing of excess tobacco, and subject to a penalty of $318,163.02 (246,638 pounds times $1.29 per pound) unless satisfactory proof was furnished to the STC within 15 days that the excess resales did not represent excess marketings.

Dealer contested the penalty on 3/16/90 stating he was totally unaware that these sales were made on this dealer card.

Dealer was notified on 4/6/90 that the STC would consider his appeal of the penalty on April 16. He was advised that he could present any additional information that would be helpful to the STC in making a determination regarding the penalty.

On 4/12/90, dealer requested postponement of the hearing due to insufficient time to obtain needed information and records from various warehouses.

On 5/15/90, dealer was notified that his appeal would be considered by the STC on 6/20/90. He was advised that any additional information available could be submitted for consideration by the STC.

By letters dated 4/10/90 and 5/22/90, dealer furnished copies of checks issued by the various warehouses for respective sales in question. He contends these checks do not bear his endorsement nor were they deposited to his bank account.

Dealer attended the 6/20/90 STC meeting and was given the opportunity to present any additional information that would be helpful to the STC in making their determination regarding assessment of the marketing penalty.

Also attending the STC meeting were Dallas Smith, Director, TPD, Washington, and Margaret P. Williams, STO Tobacco Program Specialist. A verbatim transcript of the hearing was

prepared by an official reporter of the Heritage Reporting Corporation, Washington, D.C.

Dealer presented his explanation for the following excess resales:

New Greenville Warehouse, Greenville, N.C.	196,599 Pounds
Planters Warehouse, Clarksville, VA.	5,883 Pounds
New Farmers Warehouse, Clarksville, VA.	5,770 Pounds
Virginia-Carolina Warehouse, Clarksville, VA.	3,953 Pounds
Gold Leaf Warehouse, Brookneal, VA.	16,603 Pounds
Farmers-Planters Warehouse, Kenbridge, VA.	5,646 Pounds
New OK Leader Warehouse, Kenbridge, VA.	12,184 Pounds
	246,638 Pounds

After carefully reviewing evidence presented by Mr. Cole, the STC determined that the penalty of $318,163.02 which represents 246,638 pounds excess resales x $1.29 penalty rate be assessed against Dealer 2036 and that he be afforded appeal rights to DASCO, Washington, D.C.

R-4 APPEAL OF MARKETING PENALTY FOR EXCESS RESALES OF FLUE-CURED TOBACCO - PEACHTREE TOBACCO COMPANY, DEALER 2036 - 1987-88 MARKETING YEAR

Flue-Cured Tobacco Allotment and Marketing Quota Regulations at 7 CFR 725 provide as follows with respect to purchases and resales of FC tobacco by dealers:

Section 725.94(d) Dealer's Tobacco. The flue-cured tobacco resales by a dealer (as shown or due to be shown o Form MQ-79), which are in excess of his total prior flue-cured tobacco purchases (as shown or due to be shown on Form MQ-79) shall be considered to be marketing of excess tobacco and penalty thereon shall be due . . .

Section 725.94(e) Resales not Reported. Any resale of tobacco which is required to be reported by a warehouseman or dealer, but which is not so reported within the time and in the manner required, shall be considered to be a marketing of excess tobacco, unless and until such warehouseman or dealer furnishes a report of such resale which is acceptable to the State Executive Director. The penalty thereon shall be paid by the warehouseman or dealer who fails to make the report as required.

A summary of the records and reports submitted by Dealer 2036 Peachtree Tobacco Co., owned by Graham L. Cole, for the 1987-88 FC marketing year, along with the KCMO printout reflecting any activity for this dealer in all states involved with FC tobacco, showed that resales exceeded total purchases by 72,508 pounds.

Dealer was notified on 6/1/89 that a penalty of $83,384.20 (72,508 x $1.15) was due unless satisfactory proof was furnished to the STC that the resales did not represent marketing of excess tobacco.

On 6/15/89, dealer furnished documents verifying a questionable purchase of 80,464 pounds from A. C. Monk reported as a lump sum purchase on 9/25/87 which actually represented purchases on seven (7) different sale days. Also furnished were two amended MQ-80's reflecting resales at Warehouse 10524 in Greenville, N.C. which Peachtree Tobacco contended should have been charged to Virginia Dealer 5103, Glenn S. Martin, Jr.

A. C. Monk verified the purchases on seven various sale days. The N.C. State Office was contacted to verify that amended MQ-80's had been received and accepted by that office. The N.C. State Office Specialist advised their records did not reflect any change in warehouse records in that State. The Virginia State Office Specialist was contacted to determine if Dealer 5103, Glenn S. Martin, Jr. had reported resales at Warehouse 10524 on his MQ-79's in the amounts reported on sale days 8/11/87 and 9/30/87. The Virginia State Office record do not reflect these amounts nor any activity on these sale days.

On 11/15/89 State Committee meeting, the State Committee reviewed the documents involved and determined that the 80,464 pounds purchased from A. C. Monk would be applied to seven specific dates in quantities and on dates reported by Monk rather than lumped as one purchase on 9/25/87. they also determined that the amended MQ-80's for 8/11/87 and 9/30/87 for Warehouse 10524 would not be accepted and resales amount would not be deducted from records for 1987.

On 3/6/90, dealer was notified that the 1987 Itemized Dealer Account by Day had been revised to reflect A. C. Monk transactions resulting in excess resales of 45,111 pounds rather than the 72,508 pounds previously billed and that the amended MQ-80's were not acceptable. He was assessed a penalty of $51,877.65 (45,111 pounds x $1.15).

On 3/16/90, dealer contested the penalty and furnished copies of MQ-80's received from Warehouse 10524. He states two sale days in question had been sent to CED, Pitts County, Greenville, N.C. to be checked out.

On 4/3/90, Malachi McCullough, North Carolina State Office, contacted Georgia State Office regarding MQ-80's sent to Pitts County. He stated Ms. Shirley B. Hardee, who had signed original MQ-80's, n 8/11 and 9/30, 1987 had stated the initials on the amended MQ-80's were not her initials and Warehouse 10524 records did not reflect this change. A copy of her writing sample was faxed to the State Office and is part of this file.

On 4/6/90, dealer was notified that the State Committee would consider his appeal on 4/16/90 of the penalty.

By letter dated 4/10/90. dealer stated he was at a loss as how to obtain proof of these sales. He furnished a copy of his letter to CED, Pitts County, N.C., with a handwritten note on the bottom signed by CED, Pitts County, N.C., with a handwritten note on the bottom signed by CED stating he would need to contact Georgia State Office concerning the matter.

On 4/12/90, dealer requested postponement of the hearing due to insufficient time to obtain needed records.

On 5/15/90, dealer was notified that the STC hearing had been rescheduled. Dealer attended the 6/20/90 STC meeting an was given the opportunity to present any additional information that would be helpful to the STC in making their determination regarding assessment of marketing penalty.

Georgia State Office
P. O. Box 1907
Athens, Georgia 30613-4299

July 19, 1990

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. Graham L. Cole
Peachtree Tobacco Company
P. O. Box 159
Moultrie, Georgia 31768

Dear Mr. Cole:

This is in reply to your appeal and the hearing with the State ASC Committee. You are appealing the assessment of a $682.72 marketing penalty for the 1985 FC Marketing Year which represents 502 pounds of excess resales times a $1.36 penalty rate. This penalty resulted when the records and reports submitted by you were summarized for the marketing year.

After carefully considering the information contained in the State Office file and your statement that you were not contesting this penalty and intended to remit the penalty, the State Committee determined that the summarization of 1985 records is correct and that penalty of $682.72 is now due. Therefore, the debt has been recorded for offset from any CCC or ASCS payments due you.

You may make a request to enter into a written agreement for the repayment of the debt if you can document your inability to pay the full amount of the debt at this time. Approving these agreements is solely at the option of ASCS.

If payment in full is NOT made within 30 days after the date of this letter and you have not requested a repayment agreement;

1. A claim will be established.

2. The claim may be reported to other Government Agencies for offset from any amounts that may be due you.

3. Late payment interest at the annual rate of 9 percent will be applied to your debt on a daily basis from the date of this letter until your debt is paid in full.

In addition, if payment in full or arrangements to pay this debt in full are not made within 60 days after the date of this letter, information about this debt, including your name, address, taxpayer identification number, amount, status, and history of the debt, and program under which the debt arose may be disclosed to credit reporting agencies. Any request for review about the appropriateness of reporting this debt to a creditor reporting agency must be made within 30 days after the date of this letter.

If payment in full or arrangements to pay this debt in full are not made within 90 days after the date of this letter, an additional 3 percent interest shall be assessed on the unpaid balance of the debt retroactively from the date of this letter.

A prompt payment will save you money. Make check payable to ASCS and mail to the Georgia State Office at the above address.

If you feel that the facts have not been properly considered in this matter, you may appeal within 15 days of the date of this letter to the:

Deputy Administrator, State and County Operations
United States Department of Agriculture
Agricultural Stabilization and Conversation Service
P. O. Box 2415
Washington, D.C. 20013

If you appeal this decision to the Deputy Administrator, you should furnish factual information and reasons why you believe the determination is wrong.

Sincerely,

S/ RALPH T. HUDGENS

Ralph T. Hudgens
State Executive Director

cc: SED
Colquitt COF.
Morton, DD
Adm. Div., GA STO

MPWilliams:jbj
PA-6-15

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P. O. Box 1907
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July 19, 1990

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Mr. Graham L. Cole
Peachtree Tobacco Company
P. O. Box 159
Moultrie, Georgia 31768

Dear Mr. Cole:

This is in reply to your appeal and the hearing with the State ASC Committee. You are appealing the assessment of a $28,033.20 marketing penalty for the 1986 Burley Marketing Year which represents 23,361 pounds of unreported excess resales times a penalty rate of $1.20. This Committee appreciates your attendance at the hearing.

After carefully considering the information submitted by you at the hearing and the records and reports contained in the State Office file, the State Committee determined the penalty of $28,033.20 is due. Therefore, the debt has been recorded for offset from any CCC or ASCS payments due you. The Committee determined that no additional evidence was presented that would relieve your responsibility for accounting for all transactions involving your USDA Tobacco Dealer Identification Card, MQ-79-2.

You may make a request to enter into a written agreement for the repayment of the debt if you can document your inability to pay the full amount of the debt at this time. Approving these agreements is solely at the option of ASCS.

If payment in full is NOT made within 30 days after the date of this letter and you have not requested a repayment agreement;

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Dear Mr. Cole:

This is in reply to your appeal and the hearing with the State ASC Committee. You are appealing the assessment of a $318,163.02 marketing penalty for the 1986 FC Marketing Year which represents 246,638 pounds of unreported excess resales times a penalty rate of $1.29 per pound. This penalty resulted when the records and reports for the 1986 marketing year were summarized and showed that resales exceeded purchases by 246,638 pounds.

After carefully considering the information presented by you at the hearing and information contained in the State Office file, the State Committee determined the penalty of $318,163.02 is due. Therefore, the debt has been recorded for offset from any CCC or ASCS payments due you. This decision was based on the fact that no additional evidence was presented that would relieve your responsibility for accounting for all transactions involving your USDA Tobacco Dealer Identification Card, MQ-79-2.

You may make a request to enter into a written agreement for the repayment of the debt if you can document your inability to pay the full amount of the debt at this time. Approving these agreements is solely at the option of ASCS.

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July 19, 1990

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P. O. Box 159
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This is in reply to your appeal and the hearing with the State ASC Committee. You are appealing the assessment of a $51,877.65 marketing penalty for the 1987 FC Marketing Year which represents 45,111 pounds of excess resales times a penalty rate of $1.15 per pound.

After carefully considering the information submitted by you at the hearing and the records and reports contained in the State Office file, the State Committee determined the penalty of $51,877.65 is due. Therefore, the debt has been recorded for offset from any CCC or ASCS payments due you.

You may make a request to enter into a written agreement for the repayment of the debt if you can document your inability to pay the full amount of the debt at this time. Approving these agreements is solely at the option of ASCS.

If payment in full is NOT made within 30 days after the date of this letter and you have not requested a repayment agreement;

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Ralph T. Hudgens
State Executive Director

cc: SED
Colquitt COF
Morton, DD
Adm. Div., GA STO

MPWilliams:jbj
PA-6-15

FILED
U. S. COURT OF APPEALS
ELEVENTH CIRCUIT

NOVEMBER 9, 1994

MIGUEL J. CORTEZ
CLERK

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-8230

GRAHAM L. COLE

Plaintiff-Counter-Defendant-Appellee,

versus

UNITED STATES DEPARTMENT OF AGRICULTURE, AGRICULTURAL STABILIZATION AND CONSERVATION SERVICE,

Defendants-Counter-Claimants-Appellants

On Appeal from the United States District Court for the Middle District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before ANDERSON AND DUBINA, Circuit Judges, and GODBOLD, Senior Circuit Judge.

GODBOLD, Senior Circuit Judge.

PER CURIAM:

(XX) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

S/R. Lanier Anderson, III
UNITED STATES CIRCUIT JUDGE

FILED
U. S. COURT OF APPEALS
ELEVENTH CIRCUIT

SEPTEMBER 13, 1994

MIGUEL J. CORTEZ
CLERK

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-8230

District Court No. CV-91-4

GRAHAM L. COLE

Plaintiff-Counter-Defendant-Appellee,

versus

UNITED STATES DEPARTMENT OF AGRICULTURE, AGRICULTURAL STABILIZATION AND CONSERVATION SERVICE,

Defendants-Counter-Claimants-Appellants

Appeal from the United States District Court for the Middle District of Georgia

Before ANDERSON AND DUBINA, Circuit Judges, and

GODBOLD, Senior Circuit Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby VACATED; and that this cause be and the same is hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that plaintiff-counter-defendant-appellee pay to defendants-counter-claimants, appellants the costs on appeal to be taxed by the Clerk of this Court.

GODBOLD, Senior Circuit Judge, dissented and filed an opinion

Entered: September 13, 1994
For the Court: Miguel J. Cortez, Clerk

By:S/Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: November 17, 1994

Supreme Court, U.S.
FILED
APR 26 1995
OFFICE OF THE CLERK

No. 94-1354

In the Supreme Court of the United States

OCTOBER TERM, 1994

GRAHAM L. COLE, PETITIONER

v.

DEPARTMENT OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

BARBARA C. BIDDLE
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether regulations that create a rebuttable presumption that a dealer in tobacco has participated in marketing tobacco in excess of marketing quotas when the dealer has failed to report the source of tobacco sold or has reported that he has sold more tobacco than he has purchased, are valid.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	7, 9
Commissioner v. *Acker*, 361 U.S. 87 (1959)	7, 8
Thomas Jefferson University v. *Shalala*, 114 S. Ct. 2381 (1994)	10

Statutes and regulations:

Agricultural Adjustment Act of 1938, 7 U.S.C. 1281 *et seq.*	2
7 U.S.C. 1311(a)	2
7 U.S.C. 1312	2
7 U.S.C. 1313(a)	2
7 U.S.C. 1313(b)	2
7 U.S.C. 1314(a)	2, 7, 8, 9
7 U.S.C. 1373	6
7 U.S.C. 1373(a)	6, 7, 9
7 U.S.C. 1375(a)	10
7 U.S.C. 1375(b)	3, 10
7 C.F.R. (1989):	
Pt. 2:	
Section 2.65(a)(1)	2
Pts. 723-726	2
Pt. 725	3
Section 725.51(f)	3
Section 725.51(g)	3

Regulations—Continued: Page

Section 725.87(a)(1) 3
Section 725.91(a) 3
Sections 725.92-725.97 4
Section 725.94 4
Section 725.94(d) 4, 10
Section 725.94(e) 4
Section 725.100 3
Section 725.100(c)(1) 3
Pt. 726 3
Section 726.81(a)(1) 3
Section 726.85(a) 3
Sections 726.86-726.91 4
Section 726.88 4
Section 726.88(d) 4
Section 726.88(e) 4
Section 726.94 3
Section 726.94(c)(1) 3

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1354

GRAHAM L. COLE, PETITIONER

v.

DEPARTMENT OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. A1-A29) is reported at 33 F.3d 1263. The order of the district court (Pet. App. B1-B3) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1994. A petition for rehearing was denied on November 9, 1994. Pet. App. C1-C2. The petition for a writ of certiorari was filed on February 7, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Agricultural Adjustment Act of 1938, 7 U.S.C. 1281 *et seq.*, accords "farmers * * * Federal assistance to control effectively the orderly marketing" of tobacco by fashioning a complex system for creating, applying, and regulating a "national marketing quota" for tobacco. 7 U.S.C. 1311(a), 1312. The Act directs the Secretary of Agriculture to proclaim a "national marketing quota" for each kind of tobacco, 7 U.S.C. 1312, to be apportioned among the States, 7 U.S.C. 1313(a), and in turn to be apportioned as a tobacco allotment—or quota—to each tobacco producing farm, 7 U.S.C. 1313(b). The Secretary has promulgated a comprehensive regulatory scheme for determining tobacco farm marketing quotas. See 7 C.F.R. Pts. 723-726.[1] The marketing quotas are administered by the Secretary through the Agricultural Stabilization and Conservation Service (ASCS). 7 C.F.R. 2.65(a)(1).

Congress provided that "[t]he marketing of * * * any kind of tobacco in excess of the marketing quota for the farm on which the tobacco is produced * * * shall be subject to a penalty." 7 U.S.C. 1314(a). The penalty "shall be paid by the person who acquires such tobacco from the producer but an amount equivalent to the penalty may be deducted by the buyer from the price paid to the producer." *Ibid.* Congress also directed that "[t]he Secretary shall prescribe such regulations as are necessary for the enforce-

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[1] The parties agreed that the regulations found in the 1989 edition of the Code of Federal Regulations applied at all times relevant to this case. See Pet. App. A3 n.1. Therefore, all citations to the Code of Federal Regulations in this brief refer to the 1989 edition.

ment" of the Agricultural Adjustment Act. 7 U.S.C. 1375(b).

To monitor the problem of marketing in excess of quotas and to enforce the statutory penalty provisions, the Secretary has promulgated regulations that impose stringent recordkeeping and reporting requirements upon producers and dealers.[2] Each producer receives a "marketing card" each year that indicates the producer's quota. 7 C.F.R. 725.87(a)(1), 726.81(a)(1).[3] When the producer makes a sale, the quantity of the sale is noted on the card. 7 C.F.R. 725.91(a), 726.85(a). In addition, dealers themselves must "keep a record and make reports * * * showing all purchases and resales of tobacco made by or for the dealer." 7 C.F.R. 725.100(c)(1), 726.94(c)(1). The dealer's reports must indicate, for each lot of tobacco purchased or sold, the name and identification number of the seller or buyer of the tobacco, the date of the transaction, the number of pounds in the purchase, the amount of the penalty collected (if applicable), and other information used to enforce the tobacco quotas. 7 C.F.R. 725.100, 726.94.

The regulations protect against producers' marketing in excess of their quotas by ensuring that dealers will account for all purchases and remit or collect

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[2] A dealer is a "[a] person who engages to any extent in acquiring or selling tobacco in the form normally marketed by producers." 7 C.F.R. 725.51(g); see also 7 C.F.R. 726.51(f).

[3] The regulations are divided by type of tobacco marketed. Flue-cured tobacco is regulated by 7 C.F.R. Pt. 725. Burley tobacco is regulated by 7 C.F.R. Pt. 726. The burley regulations are identical to the flue-cured regulations in relevant respects. The majority of the tobacco at issue in this case was flue-cured.

the penalty amount that is appropriate. To that end, the Secretary has promulgated a series of regulations that ensure the effective assessment, collection, and possible return of a penalty. See 7 C.F.R. 725.92-725.97, 726.86-726.91. As relevant herein, among the "[p]enalties considered to be due from warehousemen, dealers, buyers, and others excluding the producer," 7 C.F.R. 725.94, 726.88, are:

> (d) *Dealer's tobacco.* The * * * tobacco resales by a dealer (as shown or due to be shown on [the reporting form]), which are in excess of his total prior * * * tobacco purchases (as shown or due to be shown on [the reporting form]) shall be considered to be a marketing of excess tobacco and penalty thereon shall be due at the time the marketing takes place which results in the excess. * * *
>
> (e) *Resales not reported.* Any resale of tobacco which is required to be reported by a warehouseman or dealer, but which is not so reported within the time and in the manner required, shall be considered to be a marketing of excess tobacco, unless and until such warehouseman or dealer furnishes a report of such resale which is acceptable to the State executive director. The penalty thereon shall be paid by the warehouseman or dealer who fails to make the report as required.

7 C.F.R. 725.94(d) and (e), 726.88(d) and (e).

2. Petitioner, a tobacco dealer, bought and sold tobacco during the marketing years of 1985-1986, 1986-1987, and 1987-1988. Pet. App. B2. On March 6, 1990, petitioner was notified by the Georgia Agricultural Stabilization and Conservation (ASC) Committee that an examination of records submitted by

petitioner and by dealers who had purchased tobacco from petitioner indicated that more tobacco had been sold under petitioner's dealer number than petitioner had reported as purchased. The notice informed petitioner that he was therefore being charged with the sale of excess tobacco in three separate marketing years. Demand was made upon petitioner for $398,756.59, the amount due for the purchases for which petitioner had not accounted. *Id.* at B1-B2.

After an evidentiary appeal hearing before the Georgia ASC Committee, petitioner was notified that the assessment had been affirmed. Pet. App. B25-B36. Petitioner appealed that decision to the Deputy Administrator for State and County Operations of the Department of Agriculture in Washington, D.C. On December 17, 1990, the Deputy Administrator denied the appeal, upholding the Georgia ASC Committee determination and assessment. *Id.* at B6-B11.

3. Petitioner initiated this action in district court, challenging the assessment against him on various grounds. The district court granted summary judgment in favor of petitioner on the sole ground that no statute "authorizes the assessment of penalties on dealers for the oversale of tobacco, that being the type of penalty here being imposed by [respondents] on [petitioner]." Pet. App. B2.

4. The court of appeals reversed. Pet. App. A1-A29. The court explained that, under the relevant regulations, "when a tobacco dealer sells more tobacco than he has reported buying, or when a dealer fails to report a resale of tobacco, it is presumed that the tobacco sold was over-quota tobacco, *i.e.*, tobacco purchased from a producer in excess of that producer's quota." *Id.* at A6. The court further noted that an agency may create such a presumption—which the

court noted was rebuttable under the terms of one of the regulations and under the government's own consistent practice under the other, *id.* at A5 n.4—"as long as there is a rational nexus between the proven facts and the presumed facts." *Id.* at A7.

After examining the predicate and presumed facts "in the[] context of this regulatory scheme," and reviewing the arguments advanced by petitioner, the court of appeals concluded that "the relationship [between the facts] is obviously close," Pet. App. A12, and that petitioner had "failed to demonstrate that the regulatory presumption is irrational or otherwise invalid," *id.* at A13.

Judge Godbold dissented. Pet. App. A14-A29. In his view, Congress had already determined the consequences of a dealer's improper reports by enacting 7 U.S.C. 1373, which provides for *criminal* penalties for, *inter alia*, "failing to make any report or keep any record as required by this subsection." 7 U.S.C. 1373(a). According to Judge Godbold, since Congress had addressed that issue, the Secretary's regulations amounted to an attempt improperly to "assign[] different * * * consequences" to a dealer's reporting violations. Pet. App. A20. In addition, Judge Godbold believed that the regulations had a number of other defects. He stated that they "sweep[] too broadly," *ibid.*, because they assign responsibility to the dealer for the over-quota production. *Id.* at A21-A22. He also believed that there is an insufficiently close relationship between the fact triggering the regulatory presumption (the sale of excess tobacco by the dealer) and the presumed fact (the upstream sale of over-quota tobacco by the producer to the dealer). *Id.* at A22-A24. Finally, in Judge Godbold's view, the regulations are invalid be-

cause they do not expressly provide for rebuttal of the presumption they create. *Id.* at A27-A29.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. Petitioner contends (Pet. 11) that, because 7 U.S.C. 1373(a) expressly provides for criminal sanctions for "[a]ny * * * person failing to make any report or keep any record as required by this subsection or making any false report or record," the rebuttable presumptions contained in the regulations "clearly run afoul" of *Commissioner* v. *Acker*, 361 U.S. 87 (1959), and *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Petitioner's contention is mistaken. Initially, although Section 1373(a) does impose criminal sanctions on dealers who fail to satisfy the regulatory reporting requirements, nothing in that provision suggests that a dealer who violates it is thereby immunized from penalties based on other statutory provisions. In this case, the penalty imposed on petitioner was based on 7 U.S.C. 1314(a), which provides that the penalty for an over-quota sale "shall be paid by the person who acquired [the] tobacco." *Ibid.* Section 1314(a) thus requires that a dealer remit the penalty amount for over-quota sales in which he participated. If petitioner failed to satisfy that obligation, he is subject to a civil penalty under Section 1314(a), regardless of whether he may also be subject to the criminal penalty provisions of Section 1373(a).

Section 1314(a) does not expressly address how it may be proven that a dealer has acquired over-quota tobacco. In this case, such proof was provided in accordance with the regulations creating the rebuttable presumptions that a tobacco dealer who sells more tobacco than he has reported buying, or fails to report a resale of tobacco, has participated in over-quota sales. As the court of appeals explained (Pet. App. A9-A12), it is rational to presume, subject to rebuttal, that a dealer who has failed to report purchases of tobacco—or has reported purchasing less tobacco than he sold—has purchased the unreported tobacco from a producer selling in excess of quota. Although that presumption may not always be true, the solution to any potential problem the regulations may pose for an underreporting dealer will always lie in the dealer's hands; he can rebut the presumption by showing that the tobacco had been purchased from a producer selling within his statutorily assigned quota, or from another dealer. Accordingly, the agency validly employed the presumption in determining that petitioner is subject to a penalty under Section 1314(a).

That conclusion is fully consistent with this Court's decision in *Acker*. *Acker* stands for the proposition that, in evaluating the imposition of an administrative penalty, "[t]he first and primary question * * * is whether there is any expressed or necessarily implied provision * * * which authorizes" the penalty. 361 U.S. at 90-91. In *Acker* itself, the Court found that no such provision authorized the Internal Revenue Service (IRS) to impose a statutory penalty for underpayment of estimated taxes upon an individual who had completely failed to file any estimate of tax. The taxpayer's failure to file

such an estimate removed him from the class of people susceptible to being penalized for underpayment of estimated tax, and nothing in the statute thus authorized the IRS to impose the underpayment penalty on him. In this case, by contrast, the imposition of penalties on dealers like petitioner is authorized by Section 1314(a). Accordingly, the Secretary's action and the decision below are consistent with *Acker*.

Nothing in this Court's decision in *Chevron* casts doubt on the penalty imposed in this case. Petitioner relies (Pet. 14-15) on *Chevron*'s admonition that, if "Congress has directly spoken to the precise question at issue," the "agency * * * must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-843. He argues that Congress has spoken to the issue of dealer liability by providing the criminal penalty in Section 1373(a), and that applying the presumption in the regulations at issue in this case is inconsistent with that determination because it has the effect of subjecting dealers to penalties under Section 1314(a) as well.

As we have explained above, petitioner's contention is mistaken because the plain terms of Section 1314(a) provide that liability should be imposed on dealers, and nothing in Section 1373(a) conflicts with that language or otherwise suggests that Section 1373(a) was intended to provide the *exclusive* penalty provision applicable to tobacco dealers. Moreover, Congress expressly directed the Secretary to provide by regulation "for the identification, wherever necessary, of * * * tobacco so as to afford aid in discovering and identifying such amounts of the commodities as are subject to and such amounts thereof as are not subject to marketing restrictions in effect under" the Agricultural Adjustment Act.

7 U.S.C. 1375(a).[4] The regulations at issue in this case were fully authorized by that provision, as well as by 7 U.S.C. 1375(b), which more generally provides that "[t]he Secretary shall prescribe such regulations as are necessary for the enforcement" of the Act.

2. Petitioner also contends that one of the regulations at issue, 7 C.F.R. 725.94(d), is invalid because it "unambiguously fails to provide for rebuttal." Pet. 18 n.2. The critical question, however, is not whether the regulation unambiguously fails to provide for rebuttal, but whether the regulation unambiguously precludes rebuttal. Nothing in the regulation has that effect, and, as the court of appeals pointed out, the Secretary plainly afforded petitioner repeated opportunities to rebut the presumption that over-quota marketing had occurred. Pet. App. A5 n.4. The agency's determination that rebuttal is possible under Section 725.94(d) "must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson University* v. *Shalala*, 114 S. Ct. 2381, 2386 (1994) (internal quotation marks omitted). Since it is neither plainly erroneous nor inconsistent, the Secretary's interpretation controls. Accordingly, the court of appeals correctly concluded that the applicable regulations created a rebuttable presumption.

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[4] See Pet. App. A12. Petitioner's Appendix omits the following sentence and citation from the court of appeals' opinion, which should include, immediately before the indented quotation at Pet. App. A12:

> Indeed, the statute itself would seem to contemplate this close regulatory relationship between the several stages of the marketing process. 7 U.S.C. § 1375(a) provides:

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1995

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